( )

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

vs.

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF
WILLIAM A. DRIGGERS, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

INDEX.

	Original	Print
Case from court of common pleas of Charleston County	3	1
Judgment	3	1
Statement	3	1
Complaint	3	1
Notice of motion to strike	8	6
Notice of motion to make more definite	11	9
Answer	12	9
Minute entries	14	11
Statement of evidence	16	13
Testimony of J. F. Short	16	13
J. J. Parnell	23	18
H. L. McDonald	27	25
R. C. Rhett	28	26
M. J. Hemingston	42	40
J. J. Mansfield	45	44
Mrs. Marcella Driggers	46	45

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 18, 1928

	Original	Print
Exhibits in evidence	48	48
Train sheet on train 79, June 4, 1924	48	48
Special instructions contained in time table	48	48
Photographs	50	50
Sketch showing railroad tracks	51	50
Motion for nonsuit	51	51
Testimony of I. J. Hutto	52	52
R. B. Padgett	53	53
Sam Jones	59	58
M. H. Brandt	61	61
L. R. McCutcheon	70	71
R. W. McLaughlin	72	73
Statement of R. C. Bumbarger	75	76
Motion for directed verdict	76	77
Defendant's requests to charge	77	78
Charge to jury	79	80
Verdict	94	94
Grounds of motion for new trial	94	94
Order refusing new trial	97	97
Exceptions	98	97
Agreement re case and exceptions	114	112
Proceedings in supreme court of South Carolina	115	113
Opinion, Watts, J	115	113
Dissenting opinion, Cothran, J	121	123
Petition for stay	130	130
Order staying judgment	132	137
Bond on stay (omitted in printing)	134	
Praecipe for transcript of record	136	138
Clerk's certificate (omitted in printing)	137	
Order allowing certiorari		140

[fols. 1-3]

IN SUPREME COURT OF SOUTH CAROLINA
Case from Court of Common Pleas of Charleston County

Case from Court of Common Pleas of Charleston County

JUDGMENT

The judgment from which this appeal is taken is one entered upon the verdict of a jury rendered in the Court of Common Pleas for Charleston County on November 12th, 1925, in the amount of Twenty-five Thousand ($25,000.00) Dollars and costs.

STATEMENT

This is an action for damages in the amount of One Hundred Thousand ($100,000.00) Dollars, brought in the Court of Common Pleas for Charleston County, under the Federal Employers Liability Act, and as amended (United States Compiled Statutes, Sections 8657-8665) by the plaintiff as administratrix of William A. Driggers, deceased, for the benefit of herself as the widow of the said William A. Driggers, and of her two children. The action is against the defendants, Atlantic Coast Line Railroad Company and M. H. Brandt, and in the pleadings and at the trial it was admitted by both plaintiff and defendants that at the time of the accident to, and injuries and death of the deceased, both the deceased and the defendants were engaged in Interstate Commerce, and that the action was brought and maintained under the Federal Employers Liability Act, as amended, as aforesaid.

The Complaint, omitting the caption, was as follows:

COMPLAINT

The plaintiff, complaining of the defendants, alleges:

1. That the defendant, Atlantic Coast Line Railroad Company, is a foreign corporation organized and existing

under the laws of some state unknown to this plaintiff, but at the times hereinafter mentioned was and is operating, maintaining and controlling a railroad passing through the County of Charleston, state aforesaid, where it had and now has agents and offices for the transaction of its business which defendant is hereinafter referred to as the defendant company.

[fol. 4] 2. That at the times hereinafter mentioned, the above-named defendant, M. H. Brandt, was employed by the defendant company as an engineer, and was the engineer on and was operating the train which killed the plaintiff's intestate, as is hereinafter set forth.

3. Upon information and belief that heretofore and on or about June 4, 1924, the plaintiff's intestate was employed by the above-named defendant company as a brakeman, and was working on engine No. 164, which engine was controlled and operated by the defendant company, and was at that time operated on the main line at Etiwan Lead, in the County of Charleston, State aforesaid; that as the said engine No. 164 was approaching the southbound track of the defendant company, at or near the place known as Etiwan Lead, in the County of Charleston, State aforesaid, at a point which had been constantly used for switching purposes, and at which point freight trains were being switched at all hours of the day, making it necessary for the brakemen and other employees of the defendant company to step on and off the trains which were being operated by them at that point for the purpose of locking and unlocking the switches located there, and for the purpose of performing such other duties as they were required to perform by the defendant company, its agents and servants, the presence of which employees at that point was well known or should have been known to the defendant company, its agents and servants who were operating the defendant company's trains, the plaintiff's intestate, in the performance of his duties, stepped off the said engine No. 164, at or near the main line of the defendant company, located at or near Etiwan Lead, in the County of Charleston, State aforesaid; that while he was so doing, the defendants, their agents and servants negligently, carelessly,

recklessly and wantonly operated one of the trains of the defendaat company (which under the schedule fixed by the defendant company was not due or expected at that time at that point) without blowing any whistle or giving any [fol. 5] warning of the approach of the said train, and running at an excessive and dangerous rate of speed, and caused the same to run upon, strike, mash, bruise, mangle, and kill the plaintiff's intestate.

4. Upon information and belief that the death of the said plaintiff's intestate was caused by the negligence, carelessness, recklessness and wantonness of the defendants, their agents and servants in the following particulars, to wit:

(a) In causing and allowing the said train to run down and upon the said intestate.

(b) In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards.

(c) In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the said train, and to avoid being run over by it.

(d) In failing and omitting to give a timely or sufficient warning or signal of the approach of the said train by blowing the whistle or ringing a bell, or otherwise, so as to enable the plaintiff's intestate to save himself from being run over by the said train, although the said train was behind its schedule and the defendants, their agents and servants knew or should have known that the approach thereof was not expected by the plaintiff's intestate at that time.

(e) In causing and allowing the said train to cross a well travelled place known to the defendants, their agents and servants to be so well travelled without giving the signal or warning required to be given in such cases by the laws of the State of South Carolina.

(f) In failing and omitting to cause the said train to slow down and to slacken the speed thereof within the yard [fol. 6] limits of the defendant company while approach-

ing and passing places along where persons and employees of the defendant company were accustomed to travel.

(g) In failing and omitting to keep a proper lookout on the said train so as to be able to see plaintiff's intestate in time to avoid running him down and killing him.

(h) In failing and omitting to take the proper precaution for the safety of the employees of the defendant company at a point where switching was known by the defendants, their agents and servants to be going on practically all the day.

(i) In failing and omitting to furnish plaintiff's intestate with a reasonably safe place to work at, and in failing and omitting to provide sufficient space between the defendant company's tracks to enable its employees to safely board and alight from its trains while in the performance of their duties.

(j) In failing and omitting to adopt proper rules and regulations for the protection of the employees of the defendant company at the place hereinabove set forth, and to provide them with a safe place to work at, and in not adopting proper measures to safeguard and protect the defendant company's employees, although the defendant company, its agents and servants had been duly warned of the danger and unsafe place at which the plaintiff's intestate was required to work, and at which point he was killed, and although the defendants, their agents and servants had known of the danger of such place, a number of other employees having been injured at or near the same point where the plaintiff's intestate was killed while performing their duties for the defendant company in the course of their employment.

[fol. 7] (k) In failing and omitting to have the road bed at or about the place where plaintiff's interstate was killed properly and sufficiently ballasted so as to provide a firm and secure footing for employees alighting from the trains of the defendant company in the performance of their duties.

(l) In installing and maintaining a switch close to a curve of the defendant company's tracks at a point where the plaintiff's intestate was killed, causing the plaintiff's intestate to be thrown against the said switch after being run over by the aforesaid train.

(m) In causing and permitting defendant company's right of way between the Etiwan Lead and the main track to be obstructed and screened by billboards, weeds, bushes and shrubbery, so as to deprive the defendant's employees working on trains operating at that point of a clear and unobstructed vision.

(n) In failing and omitting to cause the land between defendant's main tracks and an important and frequently used spur track to be kept clear and free of billboards and shrubbery and other obstructions, so as enable the employees of the defendant on a train approaching the main tracks along such spur track to see an approaching southbound train on the main track.

(o) In failing and omitting to ring a bell or sound a whistle while approaching and crossing a public highway near the place at which plaintiff's intestate was struck and killed by the said train.

5. That the above named intestate left him surviving his wife, Marcella Driggers, and a posthumous son, Leslie Allen Driggers, and a son William A. Driggers, Jr., who were deprived, by the death of plaintiff's intestate, of care, counsel, support and maintenance, and as to said minor sons, of training and education also, for all of which the said wife and sons were wholly dependent upon plaintiff's intestate.

[fol. 8.] 6. That the plaintiff, Marcella Driggers, was duly appointed administratrix of the Estate of William A. Driggers, deceased, and as such brings this action for the benefit of those entitled to recover thereunder.

7. That all the said acts and ommissions on the part of the defendants were negligently, carelessly, recklessly and wantonly done, and were in utter disregard of the safety of the said Driggers and those similarly situated with him, and they, jointly and concurrently, caused the said injury and death of the said William A. Driggers, the said defendant company having owned, maintained and controlled the said train, and the said defendant, M. H. Brandt, having operated the same; all to the damage of the plaintiff in the sum of One Hundred Thousand ($100,000.00) Dollars.

8. That at the aforesaid times and places, the above-named defendants and the plaintiff's intestate were engaged in interstate commerce.

Wherefore the plaintiff herein prays judgment against the defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, besides the costs of this action.

A. R. McGowan, Shimel & Rittenberg, Plaintiff's Attorneys.

Within the time allowed by law, the defendants served upon the attorneys for the plaintiff a notice of motion to strike, and subject thereto, and saving and reserving their rights thereunder, served a notice of motion to make more definite and certain various allegations of the Complaint, and saving and reserving all their rights under both of said motion, and subject thereto, answered the Complaint.

The notice of motion to strike was as follows, omitting caption:

NOTICE OF MOTION TO STRIKE

To Messrs. Shimel & Rittenberg and A. R. McGowan, Esq., plaintiff's attorneys.

You will please take notice that on the first day of the next ensuing term of the Court of Common Pleas, at ten [fol. 9] o'clock a. m., or as soon thereafter as counsel can be heard, we shall move the Court for an Order to strike from the Complaint herein the following subdivisions of the Fourth paragraph:

"(e) In causing and allowing the said train to cross a well travelled place known to the defendants, their agents and servants to be so well travelled without giving the signal or warning required to be given in such cases by the laws of the State of South Carolina,"

on the grounds, first, that the same is irrelevant, incompetent and immaterial, in that it does not allege that the defendant was injured at the said well travelled place and the failure to give the signals or warnings required by the statute of South Carolina is not the breach of a duty owed

plaintiff's intestate, and the further ground that the said alleged failure to give the statutory signals was not, as a matter of law, the proximate cause of the said injury.

"(j) In failing and omitting to adopt proper rules and regulations for the protection of the employees of the defendant company at the place hereinabove set forth, and to provide them with a safe place to work at, and in not adopting proper measures to safeguard and protect the defendant company's employees, although the defendant company, its agents and servants had been duly warned of the danger and unsafe place at which the plaintiff's intestate was required to work, and at which point he was killed, and although the defendants, their agents and servants had known the danger of such place, a number of other employees having been injured at or near the same point where the plaintiff's intestate was killed while performing their duties for the defendant company in the course of their employment,"

on the ground that the said Complaint fails to show by proper allegations that the alleged failure and omission to [fol. 10] provide proper rules and regulations was a proximate cause of the injury complained of, and further, that said subdivision alleges other accidents at or near the same point, proof of which would be irrelevant and inadmissible at the trial of this cause, and further, that the said allegation fails to allege any negligence on the part of the defendant.

"(k) In failing and omitting to have the road bed at or about the place where plaintiff's intestate was killed properly and sufficiently ballasted so as to provide a firm and secure footing for employees alighting from the trains of the defendant company in the performance of their duties."

on the ground that the said Complaint fails to show by any allegation that the alleged failure to have the track sufficiently ballasted was a proximate cause of the injury.

(l) In installing and maintaining a switch close to a curve of the defendant company's tracks at a point where the plaintiff's intestate was killed, causing the plaintiff's

intestate to be thrown against the said switch after being run over by the aforesaid train."

on the ground that the said Complaint fails to contain any allegation to show that the specification was or could have been the proximate cause of the injury, and that same is irrelevant, immaterial and incompetent, because the defendant in installing and maintaining the said switch could not reasonably have foreseen that the plaintiff's intestate would have been struck by a train, where it is alleged that he was struck and thrown against the said switch.

"(n) In failing and omitting to cause the land between defendant's main tracks and an important and frequently used spur track to be kept clear and free of billboards and shrubbery and other obstructions, so as to enable the employees of the defendant on a train approaching the main tracks along such spur track to see an approaching southbound train on the main track,"

[fol. 11] on the ground (1) that said specification, if dealing with the land belonging to the defendant as part of its right-of-way, is redundant and a repetition of specification (m), and (2) that said specification apparently refers to land not belonging to the defendant and for the condition of which the defendant is not responsible.

"(o) In failing and omitting to ring a bell or sound a whistle while approaching and crossing a public highway near the place at which plaintiff's intestate was struck and killed by the said train,"

on the ground that the said specification shows that the plaintiff's intestate was not struck at the alleged public highway or while crossing the same, and said specification is irrelevant, incompetent and immaterial in that the alleged failure or omission to ring a bell or sound a whistle when approaching the public highway near the place of the injury, is not the breach of a duty owed the plaintiff's intestate, and is not, as a matter of law, the proximate cause of the injury complained of, and on the further ground that the said allegation is redundant, in that it is a repetition of the allegations of specification (e).

Rutledge, Hyde, Mann & Figg, Defendant's Attorneys.

The notice of motion to make more definite was as follows, omitting caption:

NOTICE OF MOTION TO MAKE MORE DEFINITE

To Messrs. Shimel & Rittenberg and A. R. McGowan, Esq., plaintiff's attorneys:

You will please take notice that on the first day of the next ensuing term of the Court of Common Pleas for Charleston County, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move the said Court for an Order requiring certain allegations of the Complaint herein to be made more definite and certain, [fol. 12] as hereinafter set forth, to wit, subdivision (j) of paragraph 4, by setting out with particularity the rules and regulations the alleged failure and omission to adopt which is alleged as negligence.

This motion shall be made by us subject to the motion to strike herein, notice of which has been previously given in this cause, and saving and reserving our rights under said motion.

Rutledge, Hyde, Mann & Figg, Defendant's Attorneys.

The answer of the defendants was as follows, omitting caption:

ANSWER

The defendant, Atlantic Coast Line Railroad Company, subject to motion heretofore noticed to strike certain portions of the Complaint and to make more definite and certain other portions thereof, and not waiving any of its rights under the said notice, but saving and reserving the same, answering the Complaint herein says:

(1) It admits that it is a corporation duly organized and existing under the laws of the State of Virginia.

(2) It admits the allegations contained in the second paragraph of the Complaint.

(3) It admits so much of the third paragraph as alleges that at the time and place mentioned, plaintiff's intestate

was in the employ of the defendant as a switchman, and that at said time and place he was injured in a collision between himself and passenger train Number 79 of the defendant and that he thereafter died.

(4) Upon information and belief this defendant denies each and every allegation contained in the fourth paragraph and the various subdivisions thereof, and this defendant says that on the day and at the place mentioned in the Complaint that plaintiff's intestate stepped off the step [fol. 13] of an engine of the defendant standing upon a side track near its main track on or in dangerous proximity to the main line track of the defendant, directly in front of the said passenger train of the defendant coming towards him on said track, which he saw, or could have seen by the exercise of due and proper care and precaution, too near said train for it to stop in time to avoid striking him, and defendant further says that it was without fault and that the negligence, carelessness and recklessness if any which caused the injury was that of the plaintiff's intestate.

(5) It has no knowledge or information sufficient to form a belief as to the allegations contained in the fifth and sixth paragraphs.

(6) It denies the allegation contained in the seventh paragraph.

(7) It admits the allegation contained in the eighth paragraph.

(8) Further answering said Complaint and for a further defense to said action, defendant alleges that the injuries to and death of plaintiff's intestate were due to and caused by the wilfulness, recklessness, carelessness and negligence of plaintiff's intestate, combining with and concurring with the alleged carelessness, recklessness, wilfulness, wantonness and negligence of the defendant, its agents and servants, and contributed to the death of the plaintiff's intestate as a proximate cause thereof, without which the same would not have happened, in that

(a) Plaintiff's intestate negligently, carelessly, recklessly and wilfully stood upon the step or foot board of the engine upon the right side thereof, contrary to the custom

of the employees of the defendant and to his instructions and the rule of the defendant;

(b) Plaintiff's intestate stepped from the side step or foot board to the ground in close and dangerous proximity to the rails of the main line of the defendant company, upon which there was approaching towards him a passenger [fol. 14] train of the defendant, which was in plain view from the place where plaintiff's intestate was standing upon the said step or foot board of the engine, and could have been seen before so alighting therefrom by the plaintiff's intestate by the exercise of due and proper care and precaution in time to have prevented his collision with said train;

(c) Plaintiff's intestate failed and omitted to heed the approach of the said passenger train, notwithstanding signals were given by whistle and bell of its approach.

(d) In failing to look up the said main line track before alighting thereon or in close and dangerous proximity thereto.

(e) In alighting on or in dangerous proximity to the main line track without any precaution for his safety and so close in front of the train that approached thereon that there was no time for said train to be stopped.

(9) Further answering said Complaint and for a further defense to said action, defendant alleges that the injury to and death of plaintiff's intestate were due to and caused by one of the risks of his business or employment assumed by the plaintiff's intestate in entering the service of defendant, i. e. to say the risk of coming in collision with a train upon a track when stepping from the engine upon which he was riding, towards and upon said track, and that said risk was obvious and was so assumed by plaintiff's intestate as aforesaid.

And having fully answered said Complaint, defendant prays that the same may be dismissed with costs.

Rutledge, Hyde, Mann & Figg, Defendant's Attorneys.

MINUTE ENTRIES

The answer of defendant Brandt, mutatis mutandis, was the same.

The motion to strike and to make more definite and certain were argued before his Honor, Judge J. W. De Vore, at the November 1925, term of the Court of Common Pleas for Charleston County, and Judge De Vore sustained the [fol. 15] action to strike out specification (e), specification (k), specification (l) and specification (o), in the fourth paragraph of the Complaint, and also a portion of specification (j) in said paragraph as follows, to wit:

"a number of other employees having been injured at or near the same point where plaintiff's intestate was killed while performing their duties for the defendant company in the course of their employment."

He refused the motion to strike the remainder of specification (j) in the fourth paragraph, and refused the motion to strike specification or sub-division (n) in said fourth paragraph as follows:

"Court: I overrule the motion to strike that out.

Mr. Figg: We submit that we have nothing to do with obstructions that are not on land and we therefore ask that that specification be stricken out.

Court: I overrule the motion to strike it out."

Judge De Vore also refused the motion to make specification (j), supra, more definite and certain in the particulars specified in the notice of motion, set out above.

The case came on to trial before his Honor, Judge De Vore and a jury at the November, 1925, term of the Court of Common Pleas for Charleston County, and prior to the trial the defendants' counsel made a motion for a continuance on the ground that R. C. Bumbarger, one of the material witnesses for the defendants, was not present at the trial, was out of the State, and could not, with due diligence on defendants' part, be brought to the trial, and submitted affidavit of R. M. Figg, Jr., one of defendants counsel, to the foregoing facts, and that the witness, if present, would, he believed, testify as shown in his signed statement as set out in the said affidavit, and plaintiff's counsel consented to admit that the witness, if present, would so testify.

The trial proceeded, and at the close of the testimony for plaintiff, defendants' counsel moved for a non-suit upon

[fol. 16] the grounds hereinafter set forth in the record, and this motion was overruled by the presiding Judge. The defendants thereupon introduced evidence and before closing their case moved the Court to send the jury to the scene of the accident to inspect the same. This motion was overruled, as hereafter shown in the record, whereupon defendants closed. There being nothing in reply, defendant's counsel moved the Court for a directed verdict in their favor, which motion was refused. After argument and the judge's charge, the jury brought in a verdict in favor of plaintiff for Twenty-five Thousand ($25,000.00) Dollars.

Motion for a new trial on the grounds hereafter set forth was duly noted and argued before the term expired, by defendants' counsel, and was marked "Heard" on the minutes of the Court, and taken under advisement by Judge De Vore. On January 2, 1926, Judge De Vore filed an order dated December 31, 1925, overruling the motion for a new trial, and thereafter, within the time allowed by law, defendants served due notice of intention to appeal, and, within due time thereafter, perfected the appeal by the service of this Case and Exceptions.

Statement of Evidence

Testimony and Proceedings

PLAINTIFF'S TESTIMONY

J. F. SHORT, sworn:

Direct examination by Mr. Shimel:

Q. What is your business, Mr. Short?

A. Photographer.

Q. How long have you been a photographer?

A. 21 years.

Q. You have a place of business in Charleston?

A. Yes, sir.

Q. Did you have occasion to take certain photographs at Etiwan Lane?

A. Yes, sir.

Q. Look at these and say if you took them—and if they are correct?

A. Yes, I made all of these.

[fol. 17] Q. Now as to the different things you have put there did you take them under Mr. Parnell's instructions?

A. Yes, sir.

Q. Some man pointed them out to you?

A. Yes, sir.

Photographs offered in evidence marked Exhibits 1, 2, 3, 4, 5.

Q. Mr. Short, when you took those pictures did you make a memorandum on them as to the date on which they were taken?

A. Yes, sir, the date on them.

Q. Tell us at what point the first one was taken? Point out to the jury that picture and tell them what it is.

A. I made this picture 70 feet from the track at street crossing camera pointed north, showing obstructed view of main track, this is Meeting Street here, this is the curve of the track, that is the main line over here, this is the side track, I guess it crosses Meeting Street.

Q. Standing over here at this track were you in a position to see whether any train was coming south, or were there any obstructions?

A. I could not see any further than here.

Q. What stopped you from seeing here?

A. All these bill boards.

Q. At what point was that taken? (Showing witness another picture.)

A. About 50 feet from the switch, the camera was pointed south, this shows the switch where the man got off the engine and the curve of the track where his engine came, and it shows the other track and these small switches, a general view of the whole place.

Q. Where was this picture taken? (Showing witness one of pictures reproduced in this Case.)

A. About 270 feet from the curve, camera about a thousand feet from the switch, pointed south.

Q. You mean you were a thousand feet from the point where the man was supposed to have been struck?

A. Yes, I was about a thousand feet from the switch.

[fol. 18] Q. Where were these men standing?

A. These men are about 270 feet from where this switch joins this track, they were on this curve about 270 feet.

Q. Now Mr. Short, explain to the jury whether standing a thousand feet away looking south could you see these men?

A. Yes.

Q. Where were these men?

A. They were standing 270 feet beyond this curve.

Q. Were you looking in the same direction in which the engineer of the train would look going south?

A. Yes, sir.

Q. Could you tell whether or not a man running a train beyond that point a thousand feet could see these men?

A. Yes, they could have been seen at a greater distance.

Q. From your general observation and your experience how far could you tell, could a man standing on a train going south see those two men there, approximately in your judgment how far could the engineer of that train have seen those men?

A. That is practically a straight track, the engineer being in the engine he could see further than I could.

Q. Now coming south if you have a man in front of these bill boards I want to know whether the man coming south on the train could have seen the man by those bill boards first, or the man by the bill boards have seen the train first. Here is what I mean, here is this train moving on this track could the man running on this train see the man by the bill boards first or could the man by the bill boards see the train first?

A. You want me to tell you whether the engineer on this train going south could see the engine on the curve first, it seems to me the man on the engine could see it before the man on the running board.

Q. How was the elevation, does the train going south go down hill?

A. I think it is down hill there, it is not such a big grade.

Q. Would you say it is down grade?

A. I believe so.

[fol. 19] Q. What does this picture show?

A. That was made about 170 feet from the switch, engine running about 30 miles an hour, the train was opposite the

switch running about 40 miles an hour, this is right where the accident occurred, I believe that is the same train.

Q. It was about the time that train was due, about what time was this picture taken?

A. Between one and two P. M. I made these pictures.

Cross-examination by Mr. Figg:

Q. Those men there can see up this track? (Examining witness on one of pictures reproduced in this case.)

A. Yes, sir.

Q. They are 270 feet from the switch around the curve?

A. Yes, sir.

Q. They are standing on the track?

A. Yes.

Q. That bill board is behind them on the south side of the track?

A. Yes, sir.

Q. Do you know who those men are?

A. I don't remember.

Q. Did you talk to any of them after you took that picture?

A. I could not say, there were three or four fellows there.

Q. Who put them there?

A. I don't know if I did or Mr. Parnel.

Q. Did they tell you they could see you?

A. Yes, I waved my hand.

Q. There was nothing to stop them seeing your camera a thousand feet up the track?

A. No, sir.

Q. They were ninety yards from what you call the point of the accident?

A. Yes, sir.

Q. This track that comes out here is called the Etiwan Lead?

A. Yes, the curve.

Q. These are switches?

A. Yes, sir.

Q. There were no switches over here?

A. I don't know what that is.

Q. Is not that the thing to throw that track there?

A. I don't know exactly what that is.

[fol. 20] Q. These are worked by hand?

A. I think they are.

Q. Which is the south bound main line track?

A. I don't know.

Q. Which is south?

A. This is south.

Q. What track is this coming north?

A. You have got me, I don't know, I don't know any of those tracks I took the photographs looking south.

Q. Is not that the south bound main line track?

A. That is the second track.

Q. That is the north bound track?

A. Yes, sir.

Q. Are those Coast Line tracks?

A. I believe so.

Q. Are these Southern tracks?

A. I believe so.

Q. These are the Coast Line tracks?

A. Yes, sir.

Q. This would be the south bound main line track?

A. Yes, sir.

Q. This is the south bound main line track and that is the north bound?

A. Yes, sir.

Q. This is where the lead comes in?

A. Yes, sir.

Q. A train on that track goes in that direction?

A. Yes, sir.

Q. What track does that go into?

A. The south bound.

Q. Here is where the lead comes in?

A. Yes, sir.

Q. Your camera in this case pointed north? (Showing witness another picture.)

A. Yes, sir.

Q. Now where is Meeting Street road?

A. Right along the edge there.

Q. How far away was your camera?

A. Right along here.

Q. How far from that track?

A. About 70 feet.

Q. How far from the Meeting Street road?

A. I don't suppose any further than that wall. (Indicating)

Q. You were practically on Meeting Street?

A. Yes, sir.

Q. What is that distance? (Indicating distance to wall)

A. About ten feet.

Q. How far was your camera from the main track here?

A. I don't know.

[fol. 21] Q. How far was your camera from the switch?

A. I did not take any measurements like that.

Q. It is more than 270 feet?

A. If you run a straight line, I don't know.

Q. Take any point here, is not it more than 270 feet to where the train runs into the north bound track?

A. I suppose so.

Q. If it was less than that you could see up the track?

A. Yes, sir.

Q. Do you think you could see from this point up the track?

A. I don't know, I could not tell you.

By Mr. Shimel:

Q. You were asked whether these boards were south of the track, how about these boards here, are they north or south of the track?

A. They are north.

Q. Between that and the train coming south?

A. No, sir.

Q. These were between the track the train was running on and the train coming south?

A. Yes, sir.

J. J. Parnell sworn:

Direct examination by Mr. Shimel:

Q. Mr. Parnell, are you a brother of Mrs. Marcella Driggers?

A. Yes, sir.

Q. Your sister is his widow?

A. Yes, sir.

Q. Do you remember when he was killed?

A. Yes, sir, June 4th, 1924.

Q. What did you first know of his death?

A. Mr. Hamilton phoned me at the Standard Oil Company.

Q. Did you go to where he was killed?

A. Yes, sir.

Q. What did you see there?

A. When we got there about 90 yards from the switch was a handful of meat there, he was ground up so I could not recognize him at all.

Q. You say you got about 90 yards from the switch and found him ground up?

A. Yes, sir.

Q. Was he north or south of the switch?

A. South.

[fol. 22] Q. Were you there when Mr. Short took these photographs?

A. Yes, sir.

Q. You pointed out different things to him?

A. Yes, sir.

Q. Tell us what this denotes? (Showing witness picture of bill boards, reproduced in this Case.)

A. There is a bill board on the north side of Etiwan Lead switch, the bill boards are between this lead switch and a switch going to the right, I don't know exactly the distance of the board, his camera was sitting right here pointing north to make those pictures.

Q. Did you walk along that track in front of the bill boards to see whether you could see anything coming from the north?

A. No, sir, you could not see anything until you passed this shrubbery on this track.

Q. How high was the shrubbery and bushes?

A. I suppose ten or twelve feet.

Q. How far did you walk along this track?

A. About a hundred feet.

Q. How far does the track run along obstructed by those bushes?

A. I think you would have to be almost on the main line before you could see a train clear.

Q. You say you could not see anything clear until you got actually at the curve?

A. Yes, on the main line.

Q. Tell us whether that is a general outline of the track and location there that you saw?

A. Yes, sir.

Q. This track here and this one are all the same?

A. Yes, sir, going to the coal yard crossing Meeting Street, the camera was right here between Meeting Street and the main line of the Coast Line pointing north, here is the switch that hits the track of the Southern Connection.

Q. Now which was the track on which the train was running on which your brother-in-law was working?

A. They were coming out on the north bound track going south.

[fol. 23] Q. How far from that track were the shrubbery projecting?

A. The bill board comes here and the shrubbery going out a hundred feet or more to the railroad.

Q. At what point would you have to get to see that train from the north?

A. Somewhere about here, this point here, about a hundred feet.

Q. Could you give the jury an idea about what these represent?

A. These represent the north and south bound main line tracks of the Coast Line, and this goes to one of the mills.

Q. Could you tell which is the main line south bound track of the Coast Line?

A. Here is the South Bound track. Each one of these are tracks, this one would be the south bound main line Coast Line track.

Q. At what point did you find your brother-in-law?

A. Ninety yards down here in between the north and south bound track.

Q. About 90 yards from the first switch?

A. Yes, sir.

Q. Is there any bend there or curve in the track further south?

A. Yes, sir.

Q. When you got there the train had gone?

A. Yes, sir.

Q. All you know is from information?

A. Yes, sir.

Q. Just explain to the jury what these little marks are here?

A. That is the first switch and this is the second switch, and I would judge that is the pass over switch from the north to the south bound main line.

Q. How far would you say this second switch was from the first switch?

A. About ten or twelve feet.

Q. How close would you say those two are from the track?

A. I guess about fifteen or twenty yards, fifty or sixty feet.

Q. Could you tell the point on the map which is the point on this picture?

A. The camera was sittting 50 feet from this switch, that shows this track and that lead.

Q. Where would you show on the picture the two switches to cross on this map?

A. Right here.

[fol. 24] Q. Were you there when this picture was taken?

A. Yes, sir, the photograper was one thousand feet north, camera pointing south just past that bill board, we were just about here, we could not see him at all when he made that picture he was a thousand feet north of this switch here pointing south.

Q. You could not see him?

A. No, sir.

Q. What prevented you from seeing him?

A. This shrubbery, it was not as high there as back here.

Q. Could you tell where the track on this photograph appears?

A. Yes, this one is pointing towards the Southern connection and this towards Charleston. This track here you could not hardly see it looking south from this picture the shrubbery obstructs the view of the track, this one and this track pointing towards the Southern connection.

Q. Could you tell on this map where the bill boards are?

A. Right in here in this section here.

Q. Between where the trains would come south?

A. Yes, sir, excepting on the north side of this track here above this spur.

Q. Did they have any other bill boards there at that time?

A. Yes, some on the outside.

Q. Were there any bill boards on the west side?

A. I don't know, I don't think so.

Q. What was your brother-in-law doing for a living at the time he was killed?

A. Switching for the Coast Line.

Q. Do you know whether or not his duty called him to switch on this track?

A. I guess so.

Q. Had you seen him working there?

A. Yes.

Q. Had you seen him riding on that train?

A. Yes, I would see all the train crew in there in passing.

Q. Do you know about how old a man he was?

A. Twenty-eight and a half years.

Q. Do you know what he was earning at the time he was killed?

A. No, sir, not exactly.

[fol. 25] Cross-examination by Mr. Figg:

Q. You say you had seen Mr. Driggers working on that engine?

A. Yes, sir.

Q. You had seen him several times?

A. I would say once or twice.

Q. On the same track?

A. I guess he was doing his duty.

Q. Who made that drawing you were testifying from?

A. Mr. Rhett.

Q. Did you ask him to make that drawing for you?

A. I guess Mr. Shimel asked him to.

Q. You did not have anything to do with telling him what to put on it, and what not to?

A. No, sir.

Q. He said you were one of the men standing in that picture? (Referring to picture reproduced in this Case.)

A. I was there.
Q. Were you one of them?
A. Yes, sir.
Q. You could not see the photographer?
A. No, sir.
Q. Were you looking the other way?
A. No, sir.
Q. He could see you?
A. Yes, sir.
Q. But you could not see him?
A. No, sir.
Q. Is there anything to prevent you from seeing him?
A. Yes, the shrubbery.
Q. Cannot you see the feet of that man?
A. No, sir.
Q. You can see him standing on the track?
A. No, sir.
Q. You can see his waist?
A. No, sir.
Q. You can see the light from that bill board between his legs as he stands up that way?
A. No, sir.
Q. Do you wear glasses ordinarily?
A. No, sir.
Q. How many men are there?
A. Three.
Q. You can see the men?
A. Yes, sir.
Q. That man is sort of behind the post?
A. Yes, sir.
Q. But you can see them standing there?
A. Yes, sir.
Q. Do you think the photographer put his camera on the track here, did he stand his camera on the track or on the ground?
A. He had it on the track one thousand feet away.
[fol. 26] Q. Was the camera as tall as he was?
A. Yes, sir.
Q. Any taller?
A. I don't know.
Q. He was not up on any platform?
A. No, sir.

Q. He was standing on the ground like you?
A. Yes, sir.
Q. Where were you standing, here?
A. I don't know exactly.
Q. Were you standing on the track?
A. On the track.
Q. You could not see him when he took this picture?
A. No, sir.
Q. The reason was because of this shrubbery?
A. Yes, sir.
Q. Was there anything else that kept you from seeing him?
A. Not at that particular point.
Q. You were 270 feet from the switch?
A. I did not measure it exactly.
Q. If he said so, you would not contradict him?
A. No, sir.
Q. That would throw you about a hundred feet from the track?
A. Seventy-five or a hundred feet from the track.
Q. Suppose instead of him being there there was a train could you have seen it a thousand feet away?
A. No, sir.
Q. How close to where you are standing here would that train have to get before you could see it?
A. All the way down here, if we were nearer the main line we could see it.
Q. That is the South Bound track?
A. Yes, sir.
Q. A thousand feet from that switch it would be here?
A. Some place where his camera was.
Q. You could not see that train on account of the shrubbery?
A. No, sir.
Q. Come here a minute I want to make sure you are one of these three men?
A. Yes, sir.
Q. You are not behind this shrubbery?
A. No, sir.
Q. Or behind any bill board?
A. No, sir.

[fol. 27] Mr. Shimel:

Q. Would you say that is a correct representation of those tracks—the layout there?

A. Yes, sir.

Drawing offered in evidence.

H. L. McDonald, sworn:

Direct examination by Mr. Shimel:

Q. Mr. McDonald, you are here under subpoena?

A. Yes, sir.

Q. You have been subpoenaed by both sides?

A. Yes, sir.

Q. You work for the Railroad?

A. Yes, sir.

Q. What is your occupation?

A. Yard Foreman.

Q. How long have you been employed by the Railroad Company?

A. In this case 15 years, with the Coast Line practically all my life.

Q. You are now in their employ?

A. Yes, sir.

Q. You were in their employ the day Driggers was killed?

A. Yes, sir.

Q. How long have you know Driggers?

A. I would say eight years.

Q. How long had he been working for the railroad?

A. I would say five years.

Q. How long had he been working with you?

A. I could not say around six months I could not say definitely the crew was changed so often, I would say seven months.

Q. Just exactly what were your duties at the time Driggers was killed?

A. I was in charge of the engine.

Q. What were you doing that day?

A. We were making a delivery to the Seaboard Air Line R. R. from the Etiwan Lead.

Q. Could you point out on this map, you might study it a minute and after you have done that explain it to the jury.

Mr. Figg: I object to that map until it is proved by the man who made it.

H. L. McDonald withdrawn from the stand.

[fol. 28] R. C. Rhett, sworn:

Direct examination by Mr. McGowan:

Q. Did you make that map?
A. Yes, sir.
Q. Is that a correct map?
A. Yes, sir.
Q. There are no measurements on that map?
A. No, sir, I did not put any measurements on it.
Q. Were you requested to?
A. No, sir.

Cross-examination by Mr. Figg:

Q. Did you draw it to the scale?
A. Yes, sir.
Q. Have you any idea of the scale?
A. Yes, sir, fifty feet to one inch.
Q. Now Mr. Rhett, at whose direction did you draw that map?
A. Mr. McGowan and Mr. Shimel, they told me to make a sketch of the track between the lane and the Planters.
Q. Did they ask you to put in any bill boards or shrubbery?
A. No, sir.
Q. Did they mention that to you?
A. No, sir.
Q. Indicate, will you please, how far from this first switch this point here is?
A. That would be a thousand feet.
Q. About here?
A. Yes, sir.

Q. Now what is the distance between the north bound and the south bound main line track?

A. I measured at different points, 12 feet from the center.

Q. You took one here and one there?

A. Yes, sir.

Q. You could not testify if that is a correct representation of the s'ace between the tracks here?

A. No, sir.

Q. Do you know the distance between the rails on each of those tracks?

A. No, sir, I could figure it up.

Q. Is not that four feet eight and a half inches?

A. Yes, just about.

Q. Is not it a fact that those tracks are laid out with regularity?

A. I suppose so, I did not notice any difference in them.

Q. You have made a number of these plans of railroad tracks?

A. Yes, sir.

[fol. 29] Q. Is not it a fact that railroad tracks are laid out with regularity?

A. Yes.

Q. They are standard?

A. Yes, sir.

Q. It is usually a standard distance between double tracks?

A. Yes.

Redirect examination by Mr. McGowan:

Q. I believe the first time you went up to that scene you went with Mr. Shimel?

A. Yes, sir.

Q. The last time you went up was when?

A. Yesterday afternoon.

Q. Tell the jury whether or not those bill boards have been torn down since the first time?

A. I saw some up there.

Q. Are the ones on the other side in the same place?

A. I could not tell you if they are in the same place, I saw bill boards here.

Q. You saw bill boards in here?

A. Yes, sir.

Q. When you were up there yesterday did you notice bill board here?

A. Yes.

Q. Between this track and the main line track?

A. I did not notice particularly. I was not looking for bill boards. I was getting the measurements on the track and I can't say.

H. L. McDONALD resumed the stand:

Direct examination by Mr. Shimel:

Q. Do you know the condition of the bill boards north of the track?

A. They are not there now.

Q. Were they there at the time of the accident?

A. Yes.

Q. Were they between this switch track and the point where the train would come south?

A. Yes, sir.

Q. They would obstruct that view?

Q. Yes, sir.

Q. You saw the train coming south that killed Driggers?

A. Yes, sir.

Q. At what speed was it running at that time?

A. I judge at least 50 miles an hour.

[fol. 30] Q. What was Driggers doing shortly before he was killed?

A. We came out of Charleston Yard with the engine, he and I were sitting on the back, on approaching Etiwan I told him to cut out a car and I got out and opened the switch, I left the switch open which threw a red board on the track at Magnolia Crossing; in the meantime I walked fifteen or twenty feet west of Etiwan curve to look for a train. Mr. Driggers cut out the car, flagged the crossing and stepped on the right of the right hand foot board, and I heard 79 blow at the Riverside Iron Works and I wanted to be sure he saw 79, I wanted to give him a signal and I pointed at the train, he was looking at me, I tried to call his attention to the train.

Q. He was standing on the right side of the train?

A. Yes.

Q. That was his business?

A. Yes, sir.

Q. What did that signal indicate?

A. I pointed at the train, told him to stay on the foot board, and that same signal would mean we were going to shove to the Seaboard Air Line R. R.

Q. What did that indicate to him?

A. It depends on what he took it for, if he took it for a signal we were going to shove the S. A. L. he would not think about the approaching train.

Q. Why did not you yell at him?

A. I was such a distance he could not have heard on account of the exhaust on the engine.

Q. Would that exhaust prevent him from hearing the whistle?

A. Yes, at a distance.

Q. Did he blow right on to him?

A. No, sir.

Q. How far was he dragged from the time he was struck?

A. About ninety yards.

Q. How far did the train travel from the time it hit him until it stopped?

A. I could not say, I was under a great strain seeing him mangled, I would say two or three train lengths.

[fol. 31] Q. If the engineer says that, that would be correct?

A. Yes, sir.

Q. A train travelling forty miles an hour using the best improvements that the railroad furnishes in what distance could it stop from the time it hit him, I don't mean exactly, but from your general observation?

A. It depends on the length of the train and the weight of the train, a short train would be harder to stop than a heavier train.

Q. Taking the length of the train which killed this man, if it had good brakes and everything in perfect order in what distance should it have stopped?

A. You mean in what distance would this particular train have stopped.

Q. Yes, sir.

A. A train length or a train length and a half I judge.

Q. Now in what direction were you going, taking this track here, in what direction were you going before this collision took place?

A. We were coming out here.

Q. We started yesterday to get an outline of how those things were travelling, now explain where your train was coming from, where you were, and where Driggers was, and every thing that transpired up to the time he was killed?

A. Here is Meeting Street Road, this is the lead coming out of Etiwan Lane, this is the north bound track, the outbound, and that is the south bound switch, the engine came out of Charleston to Etiwan Switch and went in this lead, Mr. Driggers flagged this Meeting Street crossing and was on the foot board of the engine; 79 was coming down the south bound track, as he stepped off right at this place he stepped into 79 there.

Q. Now could Mr. Driggers have seen that train while on this curve?

A. No, sir, not until he got about half way from Meeting Street to this switch, three car lengths out he could see it.

Q. Will you mark the point?

A. He could see about three car lengths from the main line.

[fol. 32] Q. Exactly where was Driggers standing?

A. On the right hand front foot board.

Q. As the car reached the main track was he facing north or south?

A. Facing south.

Q. In the direction opposite that which the train was coming from?

A. Yes, sir.

Q. Where were you standing?

A. I was over beyond the Etiwan Switch across the Southern Track fifteen or twenty feet, just opposite the Southern track.

Q. You were facing north?

A. Yes, sir.

Q. His business was to receive the signal from you?

A. Not all together, I was trying to draw his attention to the passenger train coming.

Q. He was looking at you?

A. Yes, sir.

Q. In the direction his train was going?

A. Yes, sir.

Q. Was there under the rules and regulations of the company was there any distinction between a signal showing that a train was coming, and a signal telling him that your train was going to back into the S. A. L. Track?

A. The signal I gave him that the train was coming would be the same signal that we were going in there.

Q. As a matter of fact that train was to be shoved back?

A. Yes, sir.

Q. And he expected it?

A. Yes, sir.

Q. When you gave that signal it would indicate either that the train was coming or to shove the train back, did you see any sign that he understood?

A. A nod of the head.

Q. Did it show that he understood that he was in danger or he understood your signal in the course of his work?

A. That he understood we were going to shove into the S. A. L.

Q. When you saw that train coming and gave that signal what did you do, did you see the danger?

A. I saw the danger coming but I was helpless, there was nothing I could do.

Q. You had no way of warning him?

A. No, sir.

[fol. 33] Q. Now Mr. McDonald,—by the way in what position did he get off that train, show how he jumped off?

A. As he was coming up on the foot board he stepped off this way to get his balance and swerved like this into the train.

Q. Was that a proper way for him to get off?

A. Yes, sir.

Q. How much space was there at the place he got off approximately?

A. I don't know, I believe those rails are fifteen feet from center to center.

Q. How much space between the end of the ties on each track?

A. I could not say.

Q. Have you any idea?

A. I imagine about four feet.

Q. From your judgment and observation would you say he could have stood there without being killed by the suction of the train as it passed there?

Objected to, that is a question for the jury.

Mr Shimel: He is an expert of that subject.

Court: He can state the facts and give his opinion, but the jury is not bound by his opinion.

A. He could not.

Q. Now Mr. McDonald, would it have been safer if the engine had been turned around so he would have stepped off at the other side?

A. If the engine had been working in the opposite direction.

Q. Would that have enabled him to get off on the east side?

A. Yes.

Q. Was it possible and feasible for the train to work the other way?

Objected to, there is no allegation as to that in the complaint.

Mr. Shimel: If they had had proper rules and regulations the man would have been alive today.

Mr. Hyde: That is not alleged as an act of negligence and we object to it.

Court: I sustain the objection.

[fol. 34] Q. Did you know when that train was due at the place where Driggers was killed, was it on time?

A. A few minutes late.

Q. So it was not expected at that particular moment?

A. We did not have any time on it.

Q. Mr. McDonald, on what side was the engineer on that train?

A. On the right hand side, the same side Driggers was on.

Q. Mr. Driggers' place was by the engineer?

A. He was on Meeting Street crossing giving signals to the engineer and he stepped up on his side.

Q. If the train was turned around where would he have been?

A. On the left side.

Q. Did the company have any platform, tower or elevation at that place over and above those bill boards so you could see a train coming south?

A. No, sir.

Mr. Hyde: I object and move to strike that out, there is no allegation and there is no specification of negligence as to that, we can't construct buildings after an accident happens, there is no rule to permit a thing like that to be brought into the case.

Mr. Shimel: I am trying to describe to your Honor the lay of the land, what was there, and that is a question for the jury to determine as to whether that place was a safe place.

Court: If you want that question to apply as to whether they furnished a safe place let him state what was furnished. If you say it was not a safe place to work let him state what was there.

Mr. Shimel: If there were bill boards and weeds, it is a question for the jury to decide whether the company should not have put some protection there.

Q. Tell me whether a tower or platform was there?

Mr. Figg: We object, that is getting at it backwards.

Court: I have ruled he can prove what was there.

Q. Was there a tower or elevation there?

Objected to.

[fol. 35] Objection sustained.

Q. State what was there?

A. Between the Etiwan Lead and the main line?

Q. Yes.

A. Bill boards and bushes that would obstruct the view about half way from Meeting Street crossing to the main line.

Q. Now Mr. McDonald, did you see the engine hit this man?

A. No, sir.

Q. What did you see?

A. As he stepped off the engine the passenger engine came into him and the engine came between me and him.

Q. Where was his body?

A. About 90 feet south of where he was hit.

Q. Where had you seen Driggers right before then?

A. As he stepped off the foot board I could see an object dangling in the driving wheel of the engine.

Q. Was the body covered up right near there?

A. We covered it up.

Q. What was its condition?

A. It was almost unrecognizable.

Q. You testified you were there for the purpose of giving some signal to show that train was to go on that switch?

A. Not at that point.

Q. Where was the signal given?

A. The switch from the Etiwan Lead being open would hold the board red at Magnolia Crossing.

Q. That would be a warning to trains going south?

Objected to as leading.

Court: That is leading.

Q. Was there any signal to any train coming south?

A. To indicate we were working, no, sir.

Q. What did you do after this man was run over?

A. I immediately went to the phone to get in touch with the yard office and the coroner.

Q. What effect did this have on you?

A. A very great strain as you can imagine.

[fol. 36] Q. You say Driggers had been working on the engine how long?

A. At that time six months, five years altogether.

Q. Was he a careful railroad man?

A. Yes, sir.

Cross-examination by Mr. Figg:

Q. Do you know the exact time of the accident?

A. No, sir, I don't recall now, it is on the accident report.

Q. Did you know at that time the exact time?

A. Yes, within a few minutes.

Q. How did you know?

A. We look at our watches in a thing like that.

Q. How long after the accident did you look at your watch?

A. I don't remember.

Q. You said the train was a few minutes late, you did not know whether it was coming?

A. No, sir.

Q. As far as you are concerned it was not your knowledge of the actual minutes it went by, you did not know if the train was due or coming?

A. No, sir.

Q. You were the conductor in charge of that crew?

A. Yes, sir.

Q. Do you know whether Driggers had a watch that day?

A. He did.

Q. You say the distance from the north bound main line track on the Etiwan Lead to Meeting Street is about six car lengths?

A. Yes, sir.

Q. That is about 240 or 250 feet?

A. Yes, sir.

Q. As you come on that lead from Meeting Street and get about half way from Meeting Street, about three car lengths you are clear of that shrubbery?

A. Yes, sir.

Q. Then you can look up the track?

A. Yes, sir.

Q. From that point you can see up the south bound main line track?

A. Yes, sir.

Q. Can you see the tower?

A. Yes, sir.

Q. Do you know how far that tower is from that point?

A. I don't know exactly.

[fol. 37] Q. It is further up than the point where Mr. Short took the photograph?

A. I did not notice, I only noticed one photograph.

Q. I hand you Exhibit No. 2, Mr. Short testified that was taken with the camera a thousand feet up the track from that switch stand?

A. Yes, sir.

Q. Now the Southern Connection tower is further than that?

A. Yes, sir.

Q. It is about a thousand feet further on than that?

A. It is a good ways beyond the edge of that picture, yes.

Q. You see those men on that photograph?

A. Yes, sir.

Q. If the front part of your engine was where they were, could a man on the front steps way up the south bound track see a man where this picture was taken from?

A. He could.

Q. If a man was here?

A. Yes, you can see those men.

Q. They can see you?

A. Yes.

Q. If those men were a little further down over here they could see just the same? (Indicating nearer Meeting St.)

A. Yes, sir.

Q. That was a clear day?

A. Yes, sir.

Q. It was not cloudy or misty?

A. No, sir.

Q. Perfectly clear sunshiny day?

A. Yes, sir.

Q. You say you saw the accident to Mr. Driggers?

A. Yes.

Q. Is not it a fact that when Driggers stepped off the front step of the switch engine he walked into 79?

A. No, sir, he swung into it, the pilot sill of the engine.

Q. He swung right into that as he stepped off?

A. Yes, sir.

Q. That is a little back of the pilot of the engine?

A. Yes, sir.

Q. Your engine had been into that lead to bring out 12 cars or 13 cars?

A. Yes, sir.

Q. As it came out of the lead up to the point where it runs into the north bound main line track about how fast [fol. 38] was your engine moving?

A. About 6 miles an hour, that is an up grade and a hard pull.

Q. Running very slow?

A. Yes, sir.

Q. Was the engine standing still at the time of the accident?

A. No, sir, still moving.

Q. You know Mr. Youngblood?

A. Yes, sir.

Q. What was he on that day?

A. Engineer on the engine Mr. Driggers was working on.

Q. Your engine?

A. Yes, sir.

Q. Mr. Youngblood has since died?

A. Yes, sir.

Q. Mr. McDonald, this picture here would indicate what with reference to your mind as to the bill boards and track, they look like they are one up against the other?

A. Yes, the bill boards show closer to the track, the picture shows the bill boards closer to the track, but the bill boards are more out to Etiwan lead.

Q. When you first saw that picture did you see it before the trial?

A. Yes, sir.

Q. What did you do?

A. I went up and looked the ground over and got familiar with the boards, I could not recall this board.

Q. You went up to check up the scenery?

A. I could not remember this board being so close to the track.

Q. And you found it a little further back?

A. The board was there, there is another picture that will show, the picture shows the board closer than it really is.

Q. Now coming to this question of your signal to Mr. Driggers, counsel asked you about a signal at Magnolia Crossing, when you threw the switch for your cars to go into Etiwan that automatically threw a switch at Magnolia?

A. Yes.

Q. There was no signal to trains coming south?

A. No, sir.

Q. Were you working on the south bound track?

A. No, sir.

Q. If you had thrown the pass switch would not that have thrown the signal at the Southern Connection?

[fol. 39] A. It would have the same effect on the south bound as the other on the north bound.

Q. You were going back up to the north bound main line track?

A. Yes, sir.

Q. Did you see Mr. Driggers just before he stepped off the step?

A. Yes, sir.

Q. Did you see him look back?

A. No, sir.

Q. He looked south?

A. Yes, sir.

Q. He stepped into the train?

A. As he stepped off he got his balance.

Q. He did not look up to see if the train was on the south bound track?

A. Yes, but he did not step on the south bound track, he stepped between the tracks and turned, he had to get his balance. As he stepped off the chances are he would have gone into the switch engine.

Q. You say that standing where you were you had a perfect view of the train coming down?

A. Yes, sir, I walked across the Southern track to look around the curve to see that a train did not come down the north bound track.

Q. So you stood fifteen feet on the west of the track and you saw the train coming down the south bound main line?

A. Yes, sir.

Q. How far was it from the track when you first saw it?

A. I guess three-quarters of a mile.

Q. That track is perfectly straight?

A. There is a curve somewhere there.

Q. When your engine came moving five or six miles an hour it looked as though they were going to get there the same time?

A. Yes, sir.

Q. It looked like Driggers was going to step off?

A. Yes, sir.

Q. You gave him a warning to stay on the foot board?

A. Yes, sir.

Q. You testified that Mr. Driggers may have assumed when you made that motion that you were going to back up the track?

A. Shove into the S. A. L.

Q. You were going up there?

A. Yes, sir.

[fol. 40] Q. If you were, it was not necessary for you to throw any switches?

A. Not absolutely.

Q. Where was his duty?

A. He was supposed to be on the car, it was optional for him to get off and throw the switch.

Q. Could Mr. Driggers have gotten off the left side of that switch engine?

A. Yes.

Q. That foot board runs from the right to the left side of the engine?

A. Yes, sir.

Q. Was there anything to prevent him from stepping over?

A. He would have to crawl over the draw head of the engine.

Q. Now the engine, your switch engine at the time of this accident was running in the direction the was pointing?

A. Yes, sir.

Q. It was not running with its rear to the front of the train?

A. No, sir.

Q. Mr. Driggers did not get off to throw any switch on the right side of the track?

A. No, sir.

That is all.

Redirect examination by Mr. Shimel:

Q. You were asked if he could have gotten off on the other side. Explain what he would have had to do to get off on the other side?

A. He was riding on the foot board, a switch engine has not that pilot, they have short foot board on the right and left and drawhead between, he would have to crawl over this drawhead to get on the left foot board.

Q. Don't they get off on the side they stand on?

A. Yes, sir, that is the custom.

Q. If there had been a warning to the train coming south that would have stopped the Southern train from going, what would have been the effect of that?

A. That was on a different track altogether, if we were on that track it would have stopped the train.

Q. The train would have stopped while you were working at that particular point?

A. Stopped for the board.

Q. Was that in the yard limits?

A. Yes, sir.

[fol. 41] Q. Did you see him slacken his speed?

A. I could not tell if they did.

Q. You saw him coming?

A. Yes, sir.

Q. Could you or not have told from your experience if he slacked his speed?

A. No, sir.

Q. Was there any obstruction between you and the engineer?

Objected to, let him tell what was there.

Q. What was there between you and this train coming south?

A. Nothing.

Q. How much switching was going on at that particular point?

A. No switching whatever.

Q. What was going on?

A. Just a pull out and shove back.

Q. Was that a daily occurrence?

A. They use that switch every day.

Q. More than once?

A. Some times.

Nothing further.

Recross-examination by Mr. Figg:

Q. That train was coming directly at you?

A. Yes, sir.

Q. You could not hardly have told if it slackened its speed, if he had?

A. If he shut off entirely I could have but not if he just cut down his speed.

Q. You are a conductor, I want to ask if you know what the speed limit of passenger trains are at that point, I want to know the Coast Line Regulations?

Objected to, the time table is the best evidence.

Mr. Figg: This is cross-examination.
Mr. Shimel: I submit the time table is the best evidence.
Court: I think it would be.

Q. Do you know whether or not there is any regulation as to the speed at which passenger trains, as to the maximum speed they may be run at that point?
A. Yes, sir.
Q. What is it?
A. Forty miles an hour, I think.
[fol. 42] Q. Don't you know as a matter of fact it is fifty?
A. Forty or fifty.
Q. Don't you know it is fifty as a matter of fact?
A. I was under the impression it was forty.
Q. When did you get that impression?
A. I could have it most any time.
Q. You had the impression yesterday it was fifty?
A. I don't remember.
Q. Don't you know now it is fifty miles?
A. No, sir, I don't.
Q. It may be fifty?
A. Yes, sir.
Q. Then you don't know what it is?
A. I don't know if it is forty or fifty.

By Mr. Shimel:

Q. You say you went up there and saw that the boards were not at this point, where did you find the bill boards?
A. The picture shows them closer to the track, the boards were down the track.
Q. You also said that a man standing there could see the train a thousand feet away, could a man on the engine looking south see it?
A. Looking south he could not see it.

M. J. Hemingston sworn:

Direct examination by Mr. Stoney:

Q. Mr. Hemingston, how old are you?

A. 39.

Q. What is your business?

A. Automobile repairing business.

Q. How long have you been a mechanic?

A. I started when I was old enough to start to work, approximately 20 years.

Q. In the course of your business do you have to make measurements of all kinds and descriptions?

A. I do.

Q. On Sunday did I come for you in an automobile and request you to go up the road with me?

A. You did.

Q. Did you carry a tape line?

A. I did.

Q. Now Mr. Hemingston, did or not, or were you or not requested to stop just before we got to Magnolia Crossing?

A. I was.

[fol. 43] Q. And take certain measurements at that particular point?

A. Yes, sir.

Q. Did you take any notes at the time these measurements were taken?

A. Yes, sir.

Q. Have you those measurements with you?

A. I have.

Q. Did you or not take a measurement south of Magnolia Crossing between the north and south bound Atlantic Coast Line Railroad tracks?

A. I did.

Q. Will you tell the jury what that first measurement you took is?

Objected to, that is south of Magnolia, that is not where the accident occurred.

Mr. Stoney: I am going to prove that it was narrower at the scene of the accident than anywhere else, he said the measurements were uniform.

Court: What is the purpose of it?

Mr. Stoney: I want to show it was narrower at the point of the collision than anywhere else between the south and north bound Coast Line tracks, and the only way I can do it is by a witness who has actually taken measurements.

Mr. Figg: We maintain that any measurements other than at the scene of the accident are irrelevant to any inquiry here, the question is the location at this particular point.

Mr. Stoney: They say that the tracks were uniform, this is the same north and south bound Coast Line track, the only way we can show the discrepancy is by showing at this point and where Driggers was killed.

Court: Now what difference does it make if the track at one place was a mile wider than at another place, or three inches wider? I sustain the objection.

Q. Did you also go further north with me, did you go up by the Etiwan Lead?

A. Yes, sir.

Q. You recognize Mr. Parnell?

A. Yes, sir.

Q. Did you take a certain measurement just at the switch south of the Etiwan Lead between the north bound A. C. L. [fol. 44] R. R. track and the south bound A. C. L. R. R. track?

A. Yes, sir.

Q. Was or not that point where the measurement was taken pointed out by Mr. Parnell to you?

A. Yes, sir.

Q. Will you be kind enough to tell the jury—how did you measure from the outer rail or the inner rail or the center?

A. From the inside to the inside rail.

Q. With reference to trains, what was the space between?

A. The clearance between the two tracks.

Q. Tell the jury the distance at that point?

A. 7 feet 8 and ½ inches from rail to rail.

Q. What was the distance between the ties?

A. Approximately 4 to 4 and ½ feet, they vary a little, all of the ties are not the same length.

Q. From the point where you measured the distance between the track was or not another location pointed out to you by Mr. Parnell, that is on the south?

A. Yes, sir.

Q. The distance to that point was how many feet down the south bound track?

A. Where the body was picked up was 266 feet.

Cross-examination by Mr. Figg:

Q. Your measurement was taken from the inside rail to the inside rail from the outer edge of the other rail?

A. Yes, sir.

Q. Do you know the distance between the two rails on one of those main line tracks at that point?

A. You mean the track itself, the gauge?

Q. Yes, sir.

A. 4 feet 8 and ½ inches.

Mr. Shimel: We now offer in evidence the time table of the Atlantic Coast Line Railroad Company with the instructions therein contained.

We offer in evidence the movement of this train of that day, brought here by the A. C. L. showing the movement of train 79 on June 4th, 1924.

[fol. 45] J. J. Mansfield sworn:

Direct examination by Mr. Shimel:

Q. Mr. Mansfield, you are the Coroner of this County?

A. Yes, sir.

Q. And held that position in June, 1924?

A. Yes, sir.

Q. Did you have occasion on that day to see the body of Driggers?

A. Yes, sir.

Q. Tell the court and jury where you saw it, and in what condition it was?

A. In and around three mile crossing.

Q. What was the condition of the body?

A. Head pretty well decomposed, arm broken, parts of his brains out on the ground.

Mr. Figg: We object, this suit is not for any pain and suffering, it is simply for the loss of pecuniary benefits.

Court: Overrule the objection.

Q. Describe the condition of the body?

A. Ground up, *laying* between the Coast Line tracks, head pretty badly decomposed.

Q. What part of the body was broken?

Mr. Figg: I object to all testimony along this line and move to strike it out.

Court: I overrule the objection.

Q. All right, answer the question?

A. His head was pretty well ground up, arm broken, also his leg.

Q. Could you tell which arm was broken?

A. I think the left, I am not positive. I noticed part of his brains lying close to the end of the cross ties.

Q. Just exactly at what spot did you find the body?

A. Close to the switch.

Q. How close to that would you say the body was?

A. I would say 70 or 100 feet.

Q. Did you see more than one switch there?

A. I just noticed one.

Q. And from that it was how far?

A. Between 70 and 100 feet.

[fol. 46] Q. Do you know whether that switch was at the center of the track?

A. I don't know.

Q. How far was the body from the east rail of the south bound track?

A. I could not answer that question.

Q. Would you say it was right alongside or further away?

A. Between the two rails, the eastern and the western rail, I am under the impression it was between the north and south bound rails.

Cross-examination by Mr. Figg:

Q. What did you say about 70 and 100 feet?

A. South of the switch.

Mrs. Marcella Driggers sworn:

Direct examination by Mr. Shimel:

Q. Are you the widow of W. A. Driggers?

A. Yes, sir.

Q. You have been appointed administratrix of his estate?

A. Yes, sir.

Q. How long have you been married?

A. 6 years, and 5 months.

Q. How old was your husband when he was killed?

A. Twenty-eight and a half.

Q. What was he doing for a living?

A. Working for the Atlantic Coast Line Railroad Company, switching.

Q. How long had he been working for the railroad company?

A. 5 years.

Q. What had he been doing before he was employed by the railroad company?

A. He was a sailor.

Q. How much did he earn at the time he was killed?

A. Six dollars and sixteen cents a day.

Q. You say he was a switchman?

A. Yes, sir.

Q. Had he been working every day?

A. Yes, sir.

Q. Was he a healthy man or sickly man?

A. Healthy.

Q. Did he work at times on Sunday?

A. He worked on Sunday when the job worked.

Q. Did he get paid for Sunday?

A. Yes, sir.

Q. Do you know whether he got on Sunday the same pay as the week days?

A. Yes, sir.

[fol. 47] Q. What did he do with the money he earned?

A. Supported his family.

Q. Who did the family consist of?

A. Mr. Driggers, myself and son.

Q. How old was your boy at the time his father was killed?

A. He would have been three years after he was killed.

Q. Have you any other children by your husband?

A. Yes, sir, one.

Q. When was that child born?

A. The 22nd of August.

Q. After your husband died?

A. Yes, sir.

Q. You were pregnant with it when your husband died?

A. Yes, sir.

Q. When did you learn of your husband's death?

A. Doctor Jager told me.

Q. He was your physician?

A. Yes, sir.

Q. How old were you at the time your husband died?

A. 23.

Q. How did your husband conduct himself towards you and your child, did he support you?

A. Yes, sir.

Q. Did you have any other means of support other than his earnings?

A. No, sir.

Q. Did he work regularly?

A. Yes, sir.

Q. Was he a sober man or drinking man?

A. Sober.

Q. Was he devoted to his family?

A. Yes, sir.

Q. Where did you live at that time?

A. Brigade Street, opposite the Standard Oil Co.

Q. Did the defendant company pay you any money for the death of your husband?

A. No, sir.

No questions by the defendant.

Mr. Shimel: I desire to offer in evidence the mortuary tables, and I would like to call the attention of the jury to them. The evidence is that the deceased was 28 at the time of his death, that gives him an expectancy of approximately 37 years, Mrs. Driggers' expectancy is——

Mr. Figg: I object to that.

[fol. 48] Court: Strike out about her age, I don't think that is competent.

Exhibits in Evidence

The following are copies of exhibits offered by plaintiff and two of the pictures and copy of drawing.

Copy of Train Sheet on Train 79—Florence to Charleston—June 4, 1924

Schedule time	Running time	Miles	
9:55	10:05	0	Yard Florence
9:58	10:10	0 6	Evans St.
10:11	10:20	6 6	Java
	10:46		
10:30	10:47	16 3	Coward
	11:00		
10:45	11:02	23 2	Lake City
	11:13		
10:57	11:16	29 3	Cade
	11:28		
11:13	11:30	37 7	Kingstree
	11:47		
11:35	11:52	48 4	(Yard) Lanes
11:42	12:01	52 2	Santee Bluff
11:49	12:06	55 2	(Yard) North End
12:19	12:31	72 0	Moncks Corner
1:01	1:09	95 3	North Wye Tower
1:02	1:11	95 7	(Yard) Ashley Junction
1:20	1:35	102 0	(Yard) Charleston

Special Instructions (Contained in Time Table)

Section 10. Speed Limits and Town and City Ordinances.

* * * * * * *

[fol. 49] Charleston District—All Districts

Maximum Speed Allowed on Main Line.—First class trains fifty miles per hour, except when handling box express cars, or Penna. express refrigerator cars, forty-five miles per hour. Mixed trains thirty miles per hour. Freight trains, except as otherwise provided, thirty miles per hour.

Where the "Minimum Time between Stations" for freight and mixed trains is slower than the maximum speed above prescribed, such trains will be governed by the slower speed thereby prescribed between such stations.

Speed for Mixed trains will apply to passenger trains regardless of their schedule when found necessary to mix them.

Speed on all trains to be reduced when not consistent with safety.

Section H. Interlocking Signals at Crossings, Junctions, etc.—Semaphore interlocking signals are in service at the following points, and speed of trains is restricted as shown below:

Charleston Dist.

	Speed, miles per hour	
	Psgr. trains	Frt. trains
Evans Street (Florence)	20	20
Java	40	30
Lake City	40	30
Santee Bluff (Southbound)	30	30
Santee Bluff (Northbound)	20	20
North End (Southbound)	30	30
North End (Northbound)	20	20
Neads (Sou. Ry. Crossing)	40	30
North Wye Ashley Jct. (C. & S. Trains)	10	10
North Wye Ashley Jct. (N. E. Trains)	40	30
[fol. 50] Ashley Jct. (C. & S. Trains)	10	10
Ashley Jct. (N. E. Trains)	40	30
Magnolia Ave.	30	30
Southern Conn. (Main line trains)	40	30
Southern Conn. (To and from Sou. Ry)	20	20
Town Creek	10	10
Vardell Creek	10	10
B. N. Tower	40	30
Ashley River	20	20
Hardeeville	40	30
Chatham	40	30

	Speed, miles per hour	
	Psgr. trains	Frt. trains
Central Jct. (Southbound)	40	30
Central Jct. (Northbound)	40	30
Telfair Jct. (To and from Union Statn)	10	10
Telfair Jct. (To and from Union Junction)	30	30

Section 16. Yard Limits.—Yard limits at the following points will be indicated by sign boards marked "Yard limits":

Florence	Southover	Valdosta
Sumter	Jesup	Quitman
Lanes	Folkston	Boston
Bennett	Blackshear	Thomasville
Charleston	Jacksonville	Live Oak
Ashley Junction	Nahunta	Jasper
Ravenel	Waycross	Ft. White
Johns Island	Tifton	High Springs
Green Pond	Brunswick	Pelham
Yemassee	Southern Junction	River Junction
Hardeeville	Albany	Bainbridge
Central Junction	Dupont	Dothan
[fol. 51] Grimes	Waterford	Sprague
Ozark	Troy	Montgomery
	Climax	

(Here follow photographs and diagram, marked side folio pages 50a, 50b, and 50c)

Within yard limits the main tracks may be used, protecting against Third and Fourth Class and Extra trains.

Third and Fourth Class and Extra trains must move within yard limits prepared to stop unless the main line is seen, or known to be clear.

Engines working within yard limits must clear the time of First Class trains five minutes.

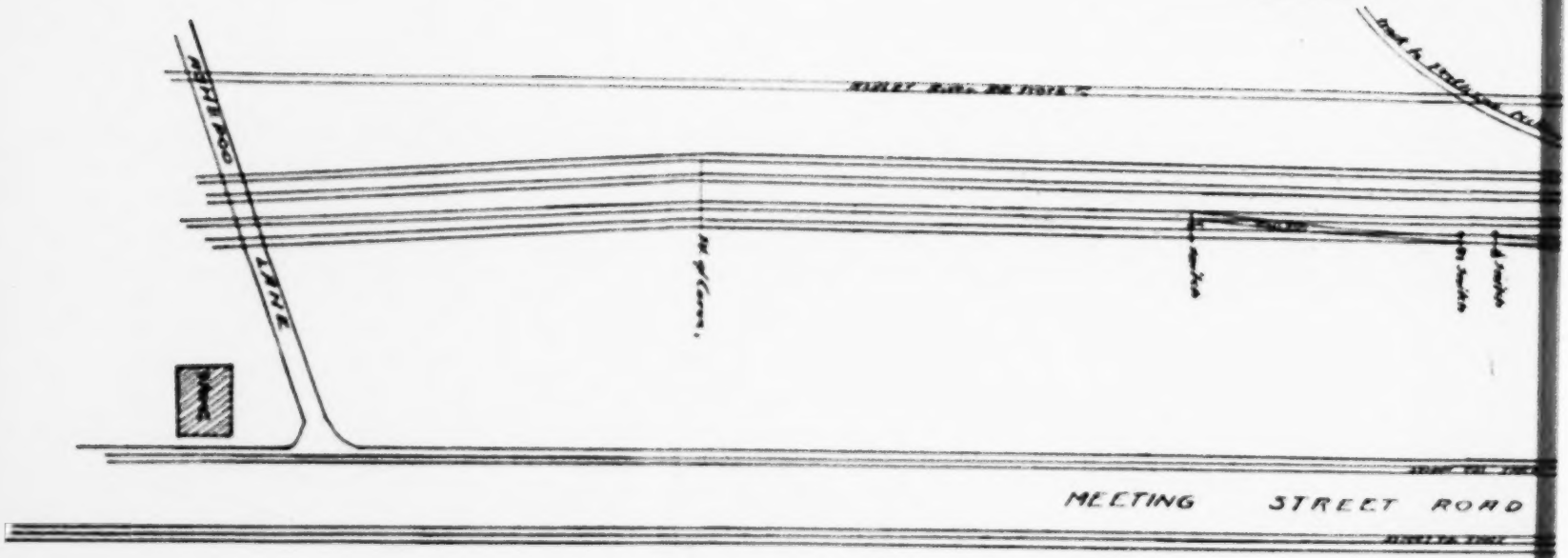
Road crews using ladder track switches in yards must leave them set for the ladder, but this will not relieve other crews using the switches from the responsibility of observing the position of switches.

Uneeda Biscuit

MEN
SWITCH

SKETCH

Showing railroad tracks of Southern and Atlan
Railroads, about 3½ miles north of Charleston, S.C.,
Lane and Ashepoo Lane
Made by actual measurements, Nov. 9th 19
Scale 1" = 50'



STANDARD OIL CO

...South Boston line
...C. between Photos

...1925 by Richard C. Bell Co.

Motion for Non-suit

At the close of the plaintiff's testimony, defendants' counsel moved the Court for a non-suit, on the following grounds, to wit:

1. That there is no sufficient evidence in the case to prove any actionable negligence on the part of the defendant Atlantic Coast Line Railroad Company or the engineer, Brandt, or either.

2. That the whole of the evidence shows that the death of the deceased was due to an unavoidable accident, and due to the fault or negligence of neither of the defendants.

3. That the injury and death of the deceased was due to and caused solely by the negligence of the deceased in stepping too near to and into the moving train.

4. That the injury and death of the deceased were due to and caused by a risk of his employment assumed by said deceased, that is to say, the risk of coming into collision with the train upon the track in this case when stepping from the engine upon which he was riding towards and upon said track and that said risk was obvious, or in the exercise of due care and prudence by deceased would have [fol. 52] been obvious, and was so assumed by him.

The Court refused the non-suit as follows:

"Court: I don't want to hear any argument. I overrule the motion. Now, gentlemen of the jury, I don't mean to tell you by overruling this motion that the plaintiff is entitled to recover. That is a question for you to answer from the testimony. But, under the law, if there is any evidence to submit to the jury, I have to submit it to the jury. I am to say whether there is any evidence and you are to say whether it is sufficient. Don't let my ruling have any weight with you. The lawyers sometimes say to the jury that the Judge thought so and so about the case, but that is not proper. The Supreme Court handles me, not the lawyers. Because I overrule the motion, don't let that have any weight with you. I am to say whether there is any evidence; you are to say whether it is sufficient."

DEFENDANTS' TESTIMONY

I. J. HUTTO sworn:

Direct examination by Mr. Figg:

Q. Where do you live?
A. 37 Cumberland Street, City of Charleston.
Q. By whom are you employed?
A. Atlantic Coast Line Railroad Company.
Q. Who were you employed by on the 4th of June, 1924?
A. Atlantic Coast Line R. R. Co.
Q. Where were you on duty on that day?
A. Magnolia Crossing, towerman.
Q. What are your duties in the tower?
A. To protect the crossing and the public and traffic, operate the gates and set signals for trains.
Q. Do you know where the Etiwan Lead is?
A. Yes, sir, about.
[fol. 53] Q. How far south of the Etiwan Lead is your tower?
A. About three quarters of a mile.
Q. State whether or not there is an indicator in your tower indicating when a train passes the Southern Connection?
A. Yes, sir.
Q. The Southern Tower is north of the Etiwan Lead?
A. Yes, sir.
Q. Do you know approximately how far it is?
A. No, sir, not exactly, I do not.
Q. On the day of this accident, just before the accident, state whether or not train 79 had come in at that time and passed your tower, or were you expecting her?
A. I was expecting her, it showed on my indicator it was in the block, had passed the Southern connection.
Q. Had you lined up for him?
A. Yes, sir.
Q. State whether or not you heard 79 blow up the track?
A. Yes, she blew for Magnolia when I lined up, four long blows.
Q. Was that before or after the accident?
A. I could not say.
Q. Was it before the train stopped?

A. Yes, sir.
Q. You saw the train stop?
A. Yes, sir.

No questions by the plaintiff.

R. B. Padgett sworn:

Direct examination by Mr. Figg:

Q. Mr. Padgett, where do you live?
A. At present at Manning, S. C.
Q. Where did you live in June, 1924?
A. 369 Ashley Avenue, Charleston, S. C.
Q. In whose employ are you now?
A. A. C. L. R. R. Co. at Manning.
Q. In whose employ were you on the 4th of June, 1924?
A. A. C. L. R. R. Co.
Q. Where were you stationed on June 4th, 1924?
A. Southern Connection tower.
Q. What were your duties there?
A. Towerman and telegraph operator, look out for all trains, give them proper signals, keep the track lined up [fol. 54] and keep O. S. sheet for Ashley Junction.
Q. What is an O. S. report?
A. The time the trains pass Ashley Junction and the tower.
Q. When you receive that O. S. report from Ashley Junction, what do you do?
A. We have a signal in the tower a mile from my tower, and the home signal is operated from about five or six hundred feet from the tower, and when I give that signal the distant signal goes up and lets the train know he will not have to stop for me.
Q. Did you do that the day of this accident?
A. Yes, sir, we do that on all passenger trains and in order to save delay we line up for him.
Q. When you set that signal state whether or not the engineer has to blow for your board?
A. It is not necessary if it indicates in the tower.
Q. This day do you remember 79 passing your tower?
A. Yes, sir.

Q. Can you estimate approximately how fast he was going past your tower?

A. Just a guess around 35 or 40 miles an hour, I would guess.

Q. Was there anything unusual about the movement of that train that day?

A. No, sir, the same as all other days, nothing unusual.

Q. Was the train blowing opposite the tower?

A. Yes, right opposite the tower, they blow for a road crossing just opposite my tower, and just past my tower they blow for Magnolia four long blows, that has to be just before he hit this man.

Q. Did he do that this day?

A. Yes, sir, every day.

Q. When he blew opposite your tower did you hear it?

A. Yes, sir, the whole thing comes up into the tower, you are obliged to hear it, it is about the level of the tower.

Q. Who was running the engine that day?

A. M. H. Brandt, everybody who works for the railroad knows him, he blows more than any other engineer we have. [fol. 55] Q. Does he blow a great deal or is he sparing with the use of the whistle?

A. He blows a great deal.

Q. Could you tell how far north of the Etiwan Lead and the main line your signal tower was?

A. About two thousand feet or a quarter of a mile.

Q. Did you see the train stop down there that day?

A. Yes, sir.

Cross-examination by Mr. Shimel:

Q. How long have you been working for the Railroad Company?

A. It soon will be 15 years, this coming March.

Q. For the Coast Line?

A. Yes, sir.

Q. You are still with them?

A. Yes, sir.

Q. What are your special duties?

A. Agent operator now at Manning.

Q. What were they at the time of this accident?

A. Towerman operator.

Q. You have been promoted now?

A. Yes, sir.

Q. Mr. Brandt is the biggest blower on the road?

A. Yes, sir.

Q. Who is the smallest blower?

A. That is hard to say.

Q. You cannot tell us who blows the least, but you can tell us who blows the most?

A. Yes, sir.

Q. That is how you are sure he was blowing that day?

A. No, sir, I heard it. You would have, if you had been in the tower.

Q. You pay attention to all of the trains to see if they blow?

A. Not that they blow, I have to see that everything is all right.

Q. Your business is to see them pass safely?

A. Give the necessary signal, yes.

Q. And to see if anybody or anything is in the way, you have to watch out for the signals?

A. Yes, sir.

Q. Your duty is not to see if a train is blowing?

A. No, sir.

[fol. 56] Q. That is the business of the man on the train?

A. Yes, sir.

Q. How far was Driggers killed from you?

A. About two thousand feet.

Q. What did you call the place your were?

A. Southern Connection tower.

Q. How much space is known as the Southern Connection?

A. They call the whole connection there, that is where the Southern comes into the Coast Line into the Union Station.

Q. What distance in your locality there is known as the Southern Connection?

A. The first signal this side is about five hundred feet and the other about five hundred feet, and the plant sets in the center of the main lines and signals run to the tower.

Q. How much space does it take in about?

A. That leads to the tower.

Q. To the tower from where?

A. Just that Southern Connection tower.

Q. State whether or not it is north or south of the tower?

A. Are you talking about the railroad track?

Q. There is a place known as the Southern Connection, I am trying to get information as to what is meant by the Southern Connection?

A. That is the tower itself.

Q. When you speak of five hundred feet above and five hundred feet below, do you mean that is the Southern Connection plant?

A. I said the Southern Connection plant.

Q. Where is the Ashley Junction, how far is that from the connection?

A. Three and a half or four miles, I don't know exactly.

Q. Where is the North Wye?

A. About a mile above Ashley Junction, about seven-eight-s of a mile.

Q. How far is Magnolia from there?

A. About a mile.

Q. How far is Ashley Junction?

A. Near five miles.

Q. While you were looking out for signals you also watched the speed of trains?

A. Yes.

[fol. 157] You watch the speed of all trains?

A. I know about the speed.

Q. You keep a look out for the speed of all trains?

A. I know about the speed.

Q. I want you to tell these gentlemen whether or not you kept a look out for all trains passing the tower?

A. I take notice of trains and their speed.

Q. What train preceded that train?

A. 83, I think.

Q. At what speed did 83 pass?

A. About the same speed 35 or 40 miles.

Q. Will you swear it was going that fast?

A. I did not have a speedometer.

Q. Will you swear he was going around fifty?

A. Both of them run about the same speed.

Q. How much was the train blowing, the one that preceded 79?

A. He did not blow as much as 79, but opposite my tower he blew, and blew for the crossing.

Q. They usually blow to warn people to keep away, is not the object of blowing when they run fast to keep people away?

A. That is the law.

Q. Mr. Brandt complied a little more effectively with the law?

A. Yes, sir.

Q. Did you ever see a train pass by there when he did not blow?

A. Not a passenger train, that I recall.

Q. You have been at that tower how many years?

A. Six.

Q. Did you ever see a freight train pass without blowing?

A. No, sir, I could not say I have, they all have to blow.

Q. You never saw a passenger train pass without blowing?

A. No, sir, switch engines pass lots of times without blowing.

Q. You, in your experience, never saw a train pass without blowing?

A. As a train, no, sir, I have not.

Q. Have you ever seen a train pass by there at a greater speed than 35 or 40 miles an hour?

A. Not that I recall.

[fol. 58] Q. Did you ever see them pass at any less speed?

A. Oh, yes, I have seen them pass at one or two miles, barely creeping.

Q. Did you see Mr. McDonald standing there?

A. I could see him across the track standing there. I knew of this shove and was expecting it.

Q. You saw him and his train?

A. Yes, sir.

Q. You recognized him?

A. No, sir.

Q. You saw the train moving?

A. Yes, sir.

Q. There is switching going on there?

A. Yes, sir.

Q. You have seen trains moving there every day?

A. Yes, sir.

Q. You have kept a proper look out?

A. Yes, that is my business.
Q. How often have you seen trains there?
A. Every day.
Q. How oftener than every day?
A. Some times five or ten minutes apart, some times an hour.
Q. Making it necessary for people to get on and off the trains?
A. The switch engines.
Q. That makes it necessary for them to get on?
A. When they are working that switch there.

Redirect examination by Mr. Figg:

Q. You say you are agent and operator at Manning?
A. Yes, sir.
Q. That is a promotion?
A. Yes, sir.
Q. Are you a resident of Charleston or Manning?
A. Manning, I was born and raised at Waterboro.
Q. Have you a distinct recollection of train 79 blowing passing your tower the day of this accident?
A. I have.
Q. What impressed that on your mind?
A. On account of the engineer of 79 and the ringing of it in my tower, I was obliged to hear it.
Q. If a train blows you can hear it with the windows up?
A. Yes, sir.
Q. Were your windows up?
A. Yes, sir.

[fol. 59] Sam Jones sworn:

Direct examination by Mr. Figg:

Q. Where is your home?
A. Augusta, Ga.
Q. You have been here quite a while?
A. Yes, sir.
Q. Where do you live?
A. 41 Drake Street.
Q. Who do you work for?

A. Atlantic Coast Line Railroad Company.

Q. How long have you worked for them?

A. Since 1902.

Q. Down here?

A. Yes, sir.

Q. You were working for them at the time of this accident to Mr. Driggers?

A. Yes, sir.

Q. What were you doing that day?

A. Firing.

Q. On what engine were you firing that day?

A. 164.

Q. Was that the engine Mr. Driggers was riding on just before the accident?

A. Yes, sir.

Q. What move had you just made before the engine was coming out of Etiwan Lead?

A. We had been down on the Meeting Street Lead with 12 or 13 cars for the S. A. L. R. R.

Q. The engine was going towards Charleston?

A. Yes, sir.

Q. The engine was facing in the direction you were going?

A. Yes, sir.

Q. Where was Mr. McDonald?

A. By the switch sor[illegible] place.

Q. You all came out [illegible] the lead in response to the signal?

A. Oh, yes.

Q. Where was Mr. Driggers?

A. I guess he was on the foot board on the engineer's side, I saw him at the Meeting Street crossing.

Q. Could you see him as you came out of that lead?

A. Yes, sir, I stepped back on my side after I saw him, I got a signal from the Captain to come on, and I stepped back.

Q. Which is your side?

A. The left.

[fol. 60] Q. Which side was Mr. Driggers?

A. On the right side.

Q. The engineer's side?

A. Yes, sir.

Q. Who was the engineer of your engine?

A. Mr. Youngblood.

Q. He is dead?

A. Yes, sir.

Q. Was that a clear day or a cloudy day?

A. A clear day.

Q. The sun was shining?

A. Yes, sir.

Q. About how many car lengths is it along that Etiwan Lead to the Meeting Street Road, to the main line, about how many car lengths is it along that track from the Meeting Street Road to the main line?

A. About five or six.

Q. As you come from the Meeting Street Road on the engine, when you first leave Meeting Street there was at that time some bill boards and shrubbery?

A. Yes, at that time of the year.

Q. On the north side of the lead?

A. Yes, sir.

Q. State whether or not that shrubbery ended before it got to the main line track?

A. You could look back down north to the tower.

Q. What tower is that you are talking about?

A. The Southern Connection.

Q. How many car lengths from the main line before you could look up and see the tower?

A. Two or three cars, I think.

Q. When you were two or three car lengths from the main line track you could look up, well state whether or not when you are two or three car lengths from the track you can look up and see the Southern Connection tower?

A. Yes, sir.

Q. When you stand on the north bound main line track can you look up the track north and see anything coming down?

A. Yes, sir.

Q. Is there anything to obstruct your view on the north bound main line track?

A. You can see if a train is coming.

[fol. 61] Q. There is no shrubbery?

A. No, sir.

Q. And no bill boards on the track?

A. No, sir.

Cross-examination by Mr. Shimel:

Q. You don't know a thing about the accident?
A. No, sir.
Q. All you know is that the accident happened?
A. That is right.

M. H. Brandt sworn:

Direct examination by Mr. Figg:

Q. By whom are you employed?
A. Atlantic Coast Line Railroad Company.
Q. By whom were you employed in 1924?
A. Atlantic Coast Line.
Q. What position did you hold with the Cost Line at that time?
A. Locomotive engineer.
Q. What train were you running on June 4th, 1924, the date of the accident?
A. Train 79, and 45.
Q. Where did that train come from?
A. Which train?
Q. 79?
A. It originated in the Charleston District at Florence, that is where I took it and brought it to Charleston.
Q. The day of the accident to Mr. Driggers did you see the accident?
A. No, sir.
Q. Are you familiar with the Etiwan Lead track?
A. No, sir.
Q. You know the side track where the accident occurred?
A. I know where the Etiwan Lead was.
Q. How fast was your train running approaching that track?
A. I would judge 35 or 40 miles an hour.
Q. State whether or not you saw Mr. Driggers before your engine reached there?
A. No, sir.
Q. What was the first you knew of the accident?
A. When my fireman told me we had hit a man.
Q. What is his name?

A. R. C. Bumbarger.

Q. Do you know where he is today?

A. No, sir.

[fol. 62] Q. What did you do?

A. As soon as I understood I applied my emergency and stopped and backed up to where he was lying.

Q. How many cars on your train?

A. Two coaches and two express cars.

Q. About how many train lengths was it before you brought your train to a stop?

A. Three or four.

Q. How long is one of those coaches?

A. About 60 feet.

Q. You say you did not see this accident at all?

A. No, sir.

Q. And you did not see Mr. Driggers?

A. No, sir.

Q. Explain to the court and jury why that is?

A. The principal reason I was not looking for a man there——

Q. Where were you on the engine?

A. Right hand side, back end of the boiler.

Q. What is between you and a man who stepped in front of your engine five feet in front on the left side?

A. The boiler.

Q. State whether or not that is a high boiler or low boiler?

A. It is as high as the top of my head.

Q. How far would a man have to be on the left of your engine in front of the train before you could see him?

A. I should say fifteen or twenty feet, if I had my head out of the window.

Q. If a man stepped in front of your engine on the left side less than fifteen or twenty feet in front of you, could you see him?

A. I could not.

Q. State whether or not if a man stepped in front of your engine running at the speed you were running that day, four or five feet in front of your engine could you have brought your engine to a stop before you struck him?

A. No, sir.

Q. You say you stopped in about three or four lengths of your train?

A. Yes, sir.

Q. Is that a good stop?

A. That is an emergency stop.

[fol. 63] Q. Did you put on your emergency brake?

A. Yes, sir.

Q. There has been some talk about the whistle and bell, did you blow your whistle between Ashley Junction and Magnolia Crossing?

A. Yes, sir.

Q. How many times?

A. There are 12 or 14 whistle boards and the tower signal and I never miss them.

Q. Did you blow for the Southern Connection?

A. No, sir, I very seldom have to.

Q. Did you blow as you passed it?

A. We invariably do, you can't see the crossing.

Q. Was the bell ringing on your engine coming down?

A. Yes, sir.

Q. Where did you start to ring it?

A. Coming to Ashley Junction.

Q. What kind of bell is it?

A. An ordinary bell with an automatic ringer.

Q. How do you ring it?

A. Open the valve and it will ring as long as there is a pound of air.

Q. Did you set that?

A. Yes, sir, coming to Ashley Junction.

Q. Did it work?

A. Yes, sir.

Q. It was ringing all the way down?

A. Yes, sir.

Q. After you put on your brakes and came to a stop was the bell ringing?

A. Yes, sir.

Q. What did you do after you stopped?

A. Blew the back up signal, blew it twice and backed up to where the remains of Mr. Driggers were.

Q. When you came to a stop did you cut off the bell?

A. No, sir, I did not take time.

Q. Was it ringing when you backed up?

A. Yes, sir.

Q. When you proceeded what did you notice with reference to the bell?

A. It was still ringing down to the Union Station.

Q. From the time you passed Ashley Junction it was ringing?

A. Yes, sir, until I rolled into the Union Station, it was ringing, I am positive of that.

[fol. 64] Q. Is that a regulation bell you have on there?

A. Yes, sir.

Cross-examination by Mr. Stoney:

Q. How long have you been an engineer?

A. I was promoted the 16th of December, 1902.

Q. How long had fireman Baumgardner worked for you?

A. I don't know him.

Q. Well the man who was with you that day?

A. I could not tell you.

Q. How long had he run with you?

A. I don't remember.

Q. Do you know if he is in the employ of the Coast Line?

A. I could not tell you.

Q. Do you know where he is?

A. I do not.

Q. How soon after Driggers was killed that you lost sight of him, your fireman who was with you on that day?

A. I could not tell you.

Q. I will ask you another question, are not you supposed to always have your train under control through interlocking signals?

A. No, sir.

Q. When you got a clear signal you had a perfect right to go right through?

A. Yes, sir.

Q. With that clear signal to you, you were not keeping a look out?

A. I was.

Q. Did you see Mr. McDonald?

A. I saw a Southern crew there.

Q. Did you slow up your train just after you saw McDonald?

A. I had shut off before I saw McDonald.

Q. Shut off what?

A. Steam.

Q. For what?

A. The board was against me at Magnolia.

Q. Tell the jury where you saw McDonald first?

A. I could not tell.

Q. Did you see him before you got to the tower that Mr. Padgett was in?

A. I don't know.

Q. Did you see him after you passed the tower?

A. After the accident.

[fol. 65] Q. Whose duty is it to keep a look out ahead?

A. The engineer with the assistance of the fireman.

Q. And the fireman was assisting you that day, and he is not here to-day?

A. No, sir.

Q. Had you ever been in that block and seen them coming out of the Etiwan Lead on shifting engines?

A. Lots of times.

Q. You knew that the Etiwan Lead was used for the purpose of shifting cars back and forth?

A. Yes, sir.

Q. You had seen it occur many times?

A. Yes.

Q. And you came in that block not keeping a look out?

A. No, sir.

Q. Were you keeping a look out?

A. I was, I told you I did not see Mr. McDonald.

Q. Who did you see?

A. There was not anybody there.

Q. Was there anybody there?

A. Not on the track.

Q. How long before you got there?

A. As far as I could see.

Q. Did you look before you passed the tower Mr. Padgett was in?

A. You did not ask me if I looked before I passed the tower, I looked.

Q. When did you look?

A. When I left Florence.

Q. Now we will come to the time table, you were running 79, I think that day?

A. Yes, sir.

Q. According to your time table when were you due at Lanes?

A. Due to leave there at 11:35.

Q. Tell the jury by that book when you did leave?

A. I could not tell them on that book.

Q. You have no objection to looking in the book?

A. Not a bit.

Q. When did you leave there?

A. I don't know.

Q. What does the book say?

A. 11:52.

Q. You don't mean to tell the jury that is incorrect?

A. You asked me when I left, and I don't know.

Q. According to your time table when were you scheduled to be at Santee Block?

A. 11:42.

[fol. 66] Q. Point out on this book what the record shows?

A. The book shows 12:01.

Q. How many minutes were you late then?

A. 19 minutes late.

Q. At North End look at the table, when should you have gotten to North End running 50 miles an hour?

A. As soon as I could get there after leaving Saint Stephens running 50 miles an hour, the time table allows us to run 50 miles an hour when we are late.

Q. Where does it say that?

A. That is put there.

Q. Now Mr. Brandt, tell me something about the time table as to when you should have gotten to the North Y Tower?

A. The time table shows there one minute ahead of the time due at Ashley Junction.

Q. You were due at North Y Tower at 1:01?

A. Yes, sir.

Q. What time does that show?

A. Eight minutes late.

Q. At Ashley Junction you were due there at 1:02?

A. Yes, sir.

Q. Your record shows that you got there eight minutes late?

A. Yes, sir.

Q. And when you are late you have a right to run 50 miles an hour?

A. Yes, sir.

Q. Now these rules and regulations, of course, are passed in the promotion of safety?

A. I don't know.

Q. Now if at the North Y at Ashley Junction interlocking signal the speed is limited to ten miles an hour, if you are late you don't mean that you can run fifty miles an hour?

A. You are reading the wrong place.

Q. You are limited in a certain area, if you are late, are you permitted to run fifty miles an hour?

A. I think it is forty miles an hour.

Q. When you got to that point and are late, you don't mean to say that you can run fifty miles an hour?

A. I said forty.

Q. You can go fifty without violating the rules?

A. I am not certain of that, we stop there every day.

[fol. 67] Q. For what purpose is that?

A. Special instructions.

Q. You say you are not familiar with it?

A. No, sir.

Q. How far did you have to back up before you got to Mr. Driggers?

A. Three or four train lengths.

Q. Do you recollect approximately the distance from the Etiwan Switch to where his body was found?

A. I was told we carried him a piece on the engine, I don't know.

Redirect examination by Mr. Figg:

Q. You said something here about your not being familiar with these regulations, what part did you refer to?

A. I have never made a study of Ashley Junction, we stop there every day.

Q. What kind of train is your train?

A. Local passenger.

Q. You have to stop at that point?

A. Yes, sir, we stop there.

Q. At the point of this accident is there any restriction of your speed?

A. No, sir.

Q. No restriction at all?

A. Fifty miles is the restriction.

Q. About how much late were you at the time of the accident?

A. 11 or 12 minutes late, 8 minutes at Ashley Junction.

Q. Did you at any time from Ashley Junction run over fifty miles an hour, did you run as much as fifty miles an hour?

A. I presume so.

Q. State whether or not you were keeping a proper look out just before this accident?

Objected to as leading.

Objection overruled.

A. I was.

Q. Did you see anything standing on the Southern track as you came down?

A. There was a Southern switch engine crew there at work.

Q. Did you see Mr. McDonald?

A. I could have seen him, I don't remember seeing him.

[fol. 68] Q. How near to that point was the Southern crew?

A. Just about opposite where the accident happened.

Q. State whether or not there was a number of people in that direction?

A. That Southern crew, yard crew.

Q. You said something about not looking for a man at the point of this accident?

A. I was not expecting to find anybody on that track at that place.

Q. Did anybody go on the track on your side of the train?

—. No, sir.

Q. The accident happened on the other side?

A. Yes, sir.

Q. The first you knew was when your fireman called you?

A. Yes, sir, said, "we have hit a man."

Q. Was this switching crew, state whether or not they ever operated on the south bound track there?

A. I have never seen them there.

Q. Did you see their engine come out of the lead?

A. Yes, sir, he was coming out of the lead for the north bound track.

Q. Which will stop quickest, a long train or a short train?

A. A long train will, there is more braking power.

Q. Suppose you had one or two more Pullmans attached to your train——

Objected to.

Objection overruled.

Q. Suppose you had several Pullmans on the rear, what effect would that have helped to stop you?

A. We could have stopped in a shorter distance.

Q. A heavier train will stop in a shorter distance than a light train?

A. Yes, sir.

Recross-examination by Mr. Stoney:

Q. You say you saw this engine coming out of the Etiwan Lead?

A. Yes, sir.

Q. And you did not see Mr. McDonald?

A. No, sir. If I did, I did not recognize him, I may have mistaken him for one of the Southern crew.

Q. You saw an engine coming out there?

A. Yes, sir.

[fol. 69] Q. You had passed there with that engine coming out before?

A. Several times.

Q. You had passed that identical spot many times with the engine coming out?

A. Several times.

Q. How much space is there between the engine as she comes out and the south bound train or engine on the south bound track with those two there parallel with each other?

A. The usual distance.

Q. What is it?

A. About four feet.

Q. Is there any suction from a train moving fifty miles an hour?

A. I never have been sucked by one.

Q. Give me your experience?

A. I don't know.

Q. You don't know if there is any suction from a train running fifty miles an hour?

A. I don't know.

Q. With reference to the speed of trains in that block there are certain areas where your speed is limited?

A. Yes.

Q. But it is not limited there?

A. No, sir.

Q. That is the yard limit?

A. No, sir, it is the railroad limit.

Q. Where are the yard limits?

A. About a quarter of a mile south of that.

Q. About the three mile?

A. No, sir, not as I know of.

Q. Mr. Brandt, what does that word there spell?

A. Yard. (Witness is shown the time table.)

Q. Where does it show it starts there?

A. It does not show there.

Q. Does not it show Ashley Junction?

A. It does not show that the yard limit starts at Ashley Junction, it does not say anything about it.

Q. Where does it extend to?

A. North of Magnolia.

Q. From Hanahan to the North Y Tower what does the time show there?

A. Hanahan to North Y Tower due at 12:54, North Y Tower 1:01.

Q. From Ashley Junction to the Charleston District, what does that mean there?

A. From Ashley Junction to Union Station.

[fol. 70] Q. What does the word yard mean?

A. Place of making up cars, and switching.

Q. It does not extend to Ashley Junction?

A. No, sir.

Q. Does not it show on your schedules it extends to Ashley Junction?

A. It does not.

By Mr. Figg:

Q. When that says yard on this schedule opposite the name Charleston what does that mean?

A. If you will notice after every station there is a number of the side track, Charleston does not show and it says yard promiscuously, you can store several trains there.

Q. State whether or not Ashley Junction is a yard?

A. Ashley Junction and Bennett is a yard in connection.

Q. Has that anything to do with the Charleston yard?

A. No, sir.

L. B. McCutcheon sworn:

Direct examination by Mr. Figg:

Q. By whom are you employed?

A. Atlantic Coast Line Railroad Company.

Q. By whom were you employed in June, 1924?

A. The Coast Line.

Q. What were your duties then?

A. Conductor of Train 79.

Q. On the day of the accident?

A. Yes, sir.

Q. Did you see this accident?

A. No, sir.

Q. Where were you at the time of the accident?

A. I was making up my report.

Q. What was the first you knew that anything was wrong?

A. By the brakes going on.

Q. What kind of brakes went on?

A. The emergency.

Q. How could you tell that?

A. By the train stopping so suddenly.

Q. How did it stop?

A. It went on for a little distance before it stopped.

[fol. 71] Q. How could you tell that the emergency brakes were applied?

A. Because it brings the train to a stop so much quicker.

Q. Did it have any effect on you?

A. It shook me a little.

Q. What did you do?

A. I got up right away to investigate and I went out on the platform.

Q. Did you hear the whistle of the engine blow between Ashley Junction and the place of the accident?

A. I certainly did.

Q. Once or more than once?

A. A good many times.

Q. What do you estimate the speed of that train at the Southern Connection?

A. I would say about 40 miles an hour.

Q. Is that track straight before the point of the accident?

A. For some distance.

Q. How far?

A. At least a half mile or a greater distance, a half to three-quarters, that is north of the point of the accident.

Q. Who was the engineer on your train on that day?

A. Mr. Brandt.

Q. He has just testified?

A. Yes, sir.

Q. When he is running that train do you remember him blowing his whistle?

Objected to as leading.

Court: That is leading.

Q. State how he blows his whistle?

A. He blows it very loud, people on the road know when he comes through he blows so often and so loud.

Cross-examination by Mr. Shimel:

Q. He knows about the speed better than you do in the rear?

A. Yes, sir, he is paying more attention to it.

Q. You are attending to your business?

A. Yes, sir.

Q. He is in a better position to know about the speed than you are?

A. He has his mind on it and I have my mind on something else. If I am not busy I notice the speed.

[fol. 72] Q. You were making up your report?

A. Yes, sir, I was just finished.

Q. Your mind was centered on your work?

A. It had been, I don't remember whether it was at that time or not.

Q. How fast can 79 run?

A. I don't know.

Q. Can she run 55 miles an hour?

A. I don't know, I think that engine can run 55 miles an hour.

B. W. McLaughlis sworn:

Direct examination by Mr. Figg:

Q. Who are you employed by at present?

A. The Atlantic Coast Line Railroad Company.

Q. By whom were you employed in June, 1924?

A. Atlantic Coast Line Railroad Company.

Q. What were your duties?

A. Flagman.

Q. What train were you on, on June the 4th?

A. 79.

Q. Did you see the accident?

A. No, sir.

Q. When was the first you knew of anything having occurred?

A. When the brakes went on, the brakes on the whole train, he put the emergency brake on and I knew something had happened, I braced up in the train, two other fellows were sitting by me and I said hold on, he has hit something, and they held on and when the train stopped I got out and I could not see anything, Mr. Brandt blew a back up signal, then he blew another, then I said, "come back," signed him back, and I saw something on the side of the track, I said, "He has killed some one," Mr. McCutcheon said, "Oh, no," I said, "yes," and just as we got by them I said, "It is a man." He was lying on his face. Then we backed up and after we came to a complete stop my duties were to take the rear and I got my flag and torpedoes and made back to protect anyone coming that way.

Q. Do you remember how fast you were running before the accident?

A. He slowed off a little before the accident, he was about a fraction over 45, and he shut off a little around about 35 or 40 miles an hour.

Q. Where did he slack up?

A. For that board rounding Magnolia.

[fol. 73] Q. You could not see that board until you get around that curve?

A. No, sir.

Q. State whether or not it is customary to shut off at that curve?

A. Yes, sir.

—. About how many train lengths did he stop in that day?

A. Around three.

Q. You mean that particular train?

A. Yes, sir, that was a four car train.

Q. Is that a long or short train?

A. A short train.

Q. Is that a heavy or light train?

A. A light train.

Q. Which would stop quicker, a heavy train or a light train?

A. A heavy train.

Q. Which would stop quicker, a long or a short train?

A. A long train.

Q. Why is that?

A. It has more braking power.

Q. How many years have you been working with the Atlantic Coast Line R. R. Co.?

A. Around 6 years.

Q. You are familiar with the stopping of trains?

A. Yes, sir.

Q. State whether or not this train made a good stop or a poor stop?

A. It was a good stop, he had his emergency on and I braced myself, I knew he was going to hit something.

Q. At the speed it was going, could that train have stopped in one length?

A. No, sir, it would have been impossible, if he had had on four steel Pullmans he could have stopped in a train length, it would have more braking power.

Q. How much quicker would he have stopped?

A. About a train length and a half.

Q. Was the weather clear that day?

A. Yes, sir.

Q. The sun was shining?

A. Yes, sir.

Q. Are you familiar with the scene of that accident?

A. No, not more than in passing. I have seen it like a lot of other road crossings.

Q. Is there anything to obstruct the view of anyone looking north, standing on the south bound track?

[fol. 74] A. Not a thing, you can see about three-quarters of a mile, you can see a dog at the Southern Connection.

Q. Is it straight?

A. Yes, sir.

Q. About how far from the point of the accident before it curves?

A. About three-quarters of a mile.

Q. I mean the Southern Connection tower, from the point of the accident to the tower?

A. That is about half a mile, to my best knowledge.

Q. Did that engine blow any signals from the Junction to the accident?

A. Yes, sir, he was blowing at least a minute before he hit him.

Q. When had he been blowing before that?

A. All along at all road crossings.

Q. Do you remember that he blew before the accident?

A. Yes, sir.

Q. What impressed it on your memory?

A. What impressed it on my memory? Those two fellows were talking about the Presidential Election. They said that Coolidge was going to be elected, and I made the remark that the engineer is going to blow the whistle off.

Q. You know where the Etiwan Lead is?

A. Yes, sir.

Q. Then there is another track which comes up in from the north, the Southern track. That is the Southern track?

A. Yes, sir.

Q. Which track is that? (Indicating on Drawing.)

A. Side track.

Q. Which track is that? (Indicating on Drawing.)

A. That is the track from the Standard Oil Company where they were switching, that comes in by the Southern.

Q. Did you have occasion to notice between here those boards?

A. No, sir.

Q. Have you noticed any shrubbery there?

A. No, sir.

Q. You could not tell about how far they are from the track?

A. No, sir.

Cross-examination by Mr. Stoney:

Q. You say you were talking with two men on the train?

A. Yes, sir.

[fol. 75] Q. And you said to these two men, "Well, Brandt is sure blowing today, if he hits anything it won't be his fault"?

A. Yes, sir.

Q. What were the names of these two gentlemen?

A. I don't know.

Q. Did you find out their names?

A. That is not my business.

Q. Are they in court?

A. No, sir.

Q. They were passengers on that train?

A. Yes, sir.

Q. You say on that engine coming south on the south bound track you could see a dog for three-quarters of a mile?

A. Between there and the tower I said.

Q. An engineer could see a dog for three-quarters of a mile north of the Etiwan Switch?

A. Around three-quarters, yes, sir.

Mr. Figg: I now wish to read to the jury the affidavit, or rather the statement of R. C. Bumbarger. It is agreed between counsel that if this witness were here he would testify as shown in the following statement.

Statement of R. C. Bumbarger

"I was fireman on No. 79 on June 4th. On approaching the point of the accident we were running between 35 and

40 miles an hour. So far as I know there is no restriction as to speed at the point in question. On leaving Ashley Junction the automatic bell ringer was started and the bell was ringing continuously from that time until the accident happened. There is a crossing at Southern Connection and the bell was ringing at this point, likewise the whistle was blown, the customary road crossing being given. The whistle was blown almost continuously along there and I do not think any of the crossings were passed without the crossing signal being given. At the time of the accident the engineer had just finished blowing the whistle for the block signal for Magnolia Crossing. I saw Mr. Driggers step from the foot board of the engine at this time, I hallooed to Mr. Brandt and he applied his brakes immediately bringing the train to a stop between two and a half and three train lengths in my opinion. I did not see Mr. [fol. 76] Driggers until he was in the act of stepping off the foot board and I immediately stepped down in front of the fire box."

At the conclusion of the testimony of the foregoing witnesses, the defendants moved the Court to send the jury to the scene and location of the accident and injury to deceased and offered to stand the expense. The Judge asked the jury whether they wished to go, stating that the railroad company would stand the expense.

Thereupon the following colloquy occurred:

Mr. Figg: I want to move that the jury be allowed to go up and inspect the scene of the accident. This is in your Honor's discretion, and whatever expenses are necessary, the defendants will pay them.

Court: Gentlemen of the jury, do you want to go up? If you want to go up, the Railroad Company will carry you up and pay your expenses.

The Foreman: No, your Honor, we don't care to go up.

Court: If they don't want to go up, I don't think I have the power to make them go.

Motion for Directed Verdict

Thereupon defendants rested, and, there being nothing in reply, the defendants moved the Court for a directed verdict in their favor on the following grounds, to wit:

1. That there is no sufficient evidence in the case to prove any actionable negligence in the part of the defendant Atlantic Coast Line Railroad Company or the engineer, Brandt, or either.

2. That the whole of the evidence shows that the death of the deceased was due to an unavoidable accident, and due to the fault or negligence of neither of the defendants.

3. That the injury and death of the deceased was due to and caused solely by the negligence of the deceased in stepping too near to and into a moving train.

4. That the injury and death of the deceased were due to and caused by a risk of his employment assumed by said [fol. 77] deceased, that is to say, the risk of coming into collision with the train upon the track in this case when stepping from the engine upon which he was riding towards and upon said track, and that said risk was obvious, or in the exercise of due care and prudence by deceased, would have been obvious and was so assumed by him.

The Presiding Judge overruled the motion for a directed verdict. Thereupon counsel for plaintiff and defendant submitted the following requests to charge:

DEFENDANT'S REQUESTS TO CHARGE

1. I charge you that the whole of the evidence in this case shows that the shrubbery, trees, bill boards, and other obstructions to the view of the deceased alleged by the plaintiff in this case, even if a basis for finding the defendant Atlantic Coast Line Railroad Company negligent, were not as a matter of law the proximate cause of the accident to, and death of the plaintiff's intestate, Mr. Driggers, and in passing on this case you cannot find a verdict in favor of the plaintiff based solely upon such alleged negligence.

2. I charge you that under the Federal Employers Liability Act the measure of damage recoverable *are* limited to such loss as results because the dependent relatives have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee.

The damage is limited strictly to the financial loss sustained, and is always the present cash value of the future benefits of which the beneficiaries were deprived by the death, making adequate allowance according to the circumstances for the earning power of money. The excess earnings of the deceased over the amount reasonably to be expected to be contributed to the beneficiaries cannot be reduced to a cash value and assessed as an element of damage.

If you find a verdict for the plaintiff in this case, the verdict should be computed strictly in accordance with these instructions, and the plaintiff is only entitled to a [fol. 78] verdict for the present cash value of what the deceased might reasonably have been expected to give to his wife and children had he lived.

3. I charge you that no recovery can be had for damages which the deceased might have recovered if he had survived, and I further charge you that no recovery can be had for the amount of money, as such, which the deceased might or would have made during his life. The measure of damage is only the present cash value of the future benefits which his dependents might reasonably have expected to have received from the deceased had he lived.

4. I charge you in this connection that the legal rate of interest in this state is seven (7%) per cent., and the earning power of money must be measured by this standard, rather than by any lesser standard of the same. In computing the earning power of money at law, this legal standard of 7% must be adopted, and not the savings bank standard of 4%.

5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily incident to his employment, or which arise in the progress of the work. Some employments are necessarily dangerous and fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally

incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appre-
[fol. 79] ciated them. If, however, he does actually know and appreciate the danger or risk, or by the exercise of proper care and caution should have known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover.

I charge you that if the accident involved in this case, and the death of the deceased, were caused solely by his own carelessness and negligence, then I charge you that the plaintiff cannot recover.

The Judge charged the jury as follows:

CHARGE TO JURY

After arguments of counsel, the Presiding Judge charged the jury as follows:

Mr. Foreman and Gentlemen of the jury, the sum and substance of the plaintiff's cause of action as set forth in his complaint is as follows: the plaintiff says that heretofore, to wit, on the 4th day of June, 1924, the plaintiff's intestate was employed as a brakeman on a switching engine of the defendant company. (Reads paragraphs 3rd, 5th, 6th and 7th of the complaint.)

Then they set out the acts of negligence with which they charge the defendant, which I shall read to you hereafter. That is in sum and substance the plaintiff's cause of action.

Now the answer of the defendant Atlantic Coast Line Railroad Company denies the material allegations of the complaint and sets up the defense of contributory negligence on the part of the plaintiff, and also the defense of assumption of risk, and also that the plaintiff's negligence and carelessness was the sole cause of his injury.

Now I understand the attorneys for the defendant to state that the answer of the engineer Brandt was about the same.

Mr. Hyde: Yes, your Honor.

Court: The answer of the engineer Brandt is the same as the defendant Atlantic Coast Line Railroad Company. [fol. 80] Now the plaintiff sets up specifications as to several acts of negligence which the plaintiff alleges caused the death of the deceased. In the fourth paragraph of the complaint this allegation is found:

"Upon information and belief that the death of the said plaintiff's intestate was caused by the negligence, carelessness, recklessness and wantonness of the defendants, their agents and servants in the following particulars, to wit:"

Now the first act of negligence charged against the defendant by the plaintiff is this subdivision (a):

"In causing and allowing the said train to run down and upon the intestate."

Now that is a question of fact for you to answer from the evidence, whether the defendant caused the train to run down and upon the deceased. If the defendant did that, and did it negligently and carelessly, and that was the direct and proximate cause of the death of the deceased, the plaintiff would be entitled to recover. But whether the defendant did that or not I don't know. That is for you to find out from the evidence.

The next specification is (b):

"In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards."

Well, it would be a violation of law for a railroad company to operate its train at a high and dangerous rate of speed, and in excess of that allowed by law, and it would

be a violation of law to operate in excess of the rate of speed allowed in the yard. All that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence.

The next specification is subdivision (c):

[fol. 81] "In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the said train, and so to avoid being run over by it."

Well, if they did that, that was a violation of law, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that, and that was negligence and carelessness and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence.

I may state to you here what the definition of negligence is, so that you may keep it in your minds all the way through the case, so that you may be able to ascertain whether or not the defendant was negligent or careless.

Negligence is the doing of something which a person of ordinary prudence and care would not have done under the same or similar circumstances,—that would be an act of commission,—or the failure to do something that a person of ordinary prudence and care would have done under the same or similar circumstances,—that would be an act of omission. In that connection, I charge you that a person or corporation may be guilty of negligence and no one would be entitled to recover. To illustrate, suppose a man drove up in front of the court house and left his horse without hitching it. That might be negligence, but if no one was hurt no one could recover. So you must ascertain whether that negligence was the direct and proximate cause of the injury charged.

The next act of negligence charged is (d):

"In failing and omitting to give a timely or sufficient warning or signal of the approach of the said train by blowing the whistle or ringing a bell, or otherwise, so as to enable the plaintiff's intestate to save himself from being

run over by the said train, although the said train was behind its schedule and the defendants, their agents and servants knew or should have known that the approach [fol. 82] thereof was not expected by the plaintiff's intestate at that time."

Well, if under the circumstances surrounding and connected with this inquiry, this unfortunate affair, if it was negligent for the defendant not to give the signal by blowing the whistle or ringing the bell, if it was necessary for him to do that in order to absolve himself from negligence he should do it. But suppose he failed to do that and that was negligence and carelessness on the part of the railroad company it would not necessarily follow that the plaintiff would be entitled to recover. That negligence would have to be the direct and proximate cause of the injury to plaintiff. If that be so, plaintiff would be entitled to recover. Otherwise he would not be entitled to recover.

Specification (e) has been stricken out. The next is (f):

"In failing and omitting to cause the said train to slow down and to slacken the speed thereof within the yard limits of the defendant company while approaching and passing places along where persons and employees of the defendant company were accustomed to travel."

Well, if it was necessary to absolve themselves from negligence it was their duty to slow down or slacken the speed of the train. But suppose you conclude they did not do that and that was negligence in the defendant not slowing down, it would not necessarily follow that the plaintiff would be entitled to recover. But you would have to ascertain whether that negligence was the direct and proximate cause of the injury, and if that be so, the plaintiff would be entitled to recover on that act of negligence.

The next specification is (g):

"In failing and omitting to keep a proper lookout on the said train so as to be able to see plaintiff's intestate in time to avoid running him down and killing him."

Well, it was the duty of the defendant, its agents and servants, to keep a proper lookout to keep from injuring or

[fol. 83] damaging people on the line of track, to keep a reasonable and proper look-out. But whether the defendant kept a proper look-out is a question for you to answer from the evidence. But suppose you conclude that they did not keep a proper look-out and that was negligence. You would have to go further and find out if that was the direct and proximate cause of the death of the deceased. If that be so, he would be entitled to recover, and if that was not so, he would not be entitled to recover.

The next specification is (h):

"In failing and omitting to take the proper precaution for the safety of the employees of the defendant company at a point where switching was known by the defendants, their agents and servants to be going on practically all day."

Well, it was the duty of the railroad company to take such precautions as a person of ordinary prudence and care would have taken under the same or similar circumstances to avoid injury to employees or for the safety of their employees, and if they did not do that they violated the law. But suppose you conclude that they did not. The plaintiff would not be entitled to recover even then unless you conclude that was the direct and proximate cause of the death of the deceased. If that be so, the plaintiff would be entitled to recover; otherwise he would not be entitled to recover.

The next specification is as to furnishing a safe place to work, specification (i):

"In failing and omitting to furnish plaintiff's intestate with a reasonably safe place to work at, and in failing and omitting to provide sufficient space between the defendant company's tracks to enable its employees to safely board and alight from its trains while in the performance of their duties."

That whole specification has reference to their failure to furnish a safe place for plaintiff to work in. Now the law as to that is, that the Master,—and when I say Master, I [fol. 84] mean the Railroad Company, and when I say Servant, I mean the brakeman,—it is the duty of the Master

to furnish, not an absolutely safe place to work, it is the duty of the Master to furnish a reasonably safe place for the Servant to work. And there is a corresponding duty on the Servant. The Servant has a right to assume that the Master has furnished him a reasonably safe place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the Master has performed his duty. But if the place is dangerous obviously dangerous, and can be seen by the Servant, and he goes on and performs his duty after knowing that, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the Master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you, you could see it and knew it, and you undertook to work in that place and you got hurt it would be your fault. Whether that happened in this case I don't know. You have to ascertain that from the evidence. That is about the law that covers that specification.

The next specification of negligence is (j):

"In failing and omitting to adopt proper rules and regulations for the protection of the employees of the defendant company at the place hereinabove set forth, and to provide them with a safe place to work at, and in not adopting proper measures to safeguard and protect the defendant company's employees, although the defendant company, its agents and servants, had been duly warned of the danger and unsafe place at which the plaintiff's intestate was required to work, and at which point he was killed, and although the defendants, their agents and servants, had known of the danger of such place."

[fol. 85] Well, now, the regulations with regard to proper rules and regulations, I refuse to charge anything about that because they have not introduced any rules and regulations about that place, and I can't tell you whether they were proper rules and regulations. You could not say they were proper rules and regulations because they have not been introduced here, so I refuse to charge you anything about

proper rules and regulations. Under that specification I charge you that it was the duty of the railroad company to take proper measures to safeguard the employees, not only at that place but anywhere along the line, and especially would that be so if the railroad company knew of the danger of such place and had been warned about the danger. If that be so, the railroad company would be bound to take proper precautions, and if they failed to do so, on that occasion, and that was negligence, and that was the direct and proximate cause of the death of the deceased, the plaintiff would be entitled to recover.

Specifications (k) and (l) are stricken out. The next specification is (m):

"In causing and permitting defendant company's right of way between the Etiwan Lead and the main track to be obstructed and screened by bill boards, weeds, bushes and shrubbery, so as to deprive the defendant's employees working on trains operating at that point of a clear and unobstructed vision."

Well, if the railroad company allowed that to be done as charged in this complaint, that was a violation of law. It was their duty to keep that place unobstructed so as to enable its employees to see trains coming down the railroad track to protect themselves. I don't know if there were any bill boards or shrubs there, and if I knew I could not express my opinion to you. You are the ones to say whether they were there, and if they were there did they deprive the deceased of the opportunity of seeing the train and protecting himself. That is a question you have to answer; were those shrubs there, and were they in such a [fol. 86] place as to prevent the deceased from seeing the train. If they were there and that was negligence and carelessness in preventing the deceased from seeing the train, and that was the direct and proximate cause of the death of the deceased, he could recover; otherwise he could not.

The next specification as to bill boards:

"(n) In failing and omitting to cause the land between defendant's main tracks and an important and frequently used spur track to be kept clear and free of bill boards and shrubbery and other obstructions, so as to enable the em-

ployees of the defendant on a train approaching the main tracks along such spur track to see an approaching south bound train on the main track."

What I have said to you with reference to specification (m) applies to that. They both apply to the same specification of negligence. In that connection, I charge you, and this applies to the defendant as well as the plaintiff, because the plaintiff charges certain allegations of negligence in the complaint that does not necessarily mean that the plaintiff is entitled to recover. He has to prove them. That specification about bill boards, the plaintiff has to prove that. And so when the defendant alleges an act of negligence on the part of the plaintiff. They have to prove that. Those are the specifications of negligence you have to consider in the plaintiff's cause of action.

I may state that the plaintiff must recover, if he recovers at all, on one or more or all of these acts of negligence charged against the defendant. If the deceased was killed in any other way except a negligent way charged in this complaint, he could not recover. You will have this complaint, and you will see on the margin where I have marked out certain specifications of negligence, and you need not consider those at all. They have nothing to do with the case, but those not marked out, you may consider all of them.

[fol. 87] Now the answer of the defendant Atlantic Coast Line Railroad Company denies the material allegations of the complaint, and sets up the defense of contributory negligence on the part of the plaintiff, and also assumption of risk on the part of the plaintiff.

In the eighth paragraph of the answer they allege that the death of the plaintiff's intestate was caused, etc. (Reads same.)

Well now, contributory negligence occurs in this way. Suppose you conclude that the defendant was negligent in the particulars charged against it, and you conclude that the plaintiff was also negligent, and that the plaintiff's negligence combined and concurred with the negligence of the defendant and contributed as a direct and proximate cause of his injury and without the negligence of the plaintiff his death would not have occurred. That would be contribu-

tory negligence. Now this answer says that the plaintiff was guilty of contributory negligence by getting up on the foot board of the engine on the right side contrary to the custom of the employees and the rules of the company. Now as to the rules, I don't propose to charge you about that because no rule has been introduced here. Now if he got up on the foot board on the right side and that was contrary to the custom of the employees, I don't know whether it was or not, if he got up there and that was negligence in him doing so, and that negligence and carelessness was the cause of his injury, then the defense of contributory negligence is made out. But that would not prevent the plaintiff from recovering. I will explain that to you later on. Under the Federal Act contributory negligence would not prevent the plaintiff from recovering.

Now the next act of negligence charged by the defendant against the plaintiff, he says the plaintiff was negligent in stepping from the foot board or side step to the ground in close and dangerous proximity to the rails of the main line of the defendant company, upon which there was approaching towards him a passenger train of the defendant, which [fol. 88] was in plain view from the place where plaintiff's intestate was standing upon the said step or foot board of the engine, and could have been seen before so alighting therefrom by the plaintiff's intestate by the exercise of due and proper care and precaution in time to have prevented his collision with said train.

Well, in that connection I charge you that an employee of a railroad company must use ordinary care to prevent being killed. He has to use ordinary care for his own safety. Now this specification says that he was negligent in not using his senses of sight to see whether or not the train was anywhere near him before he made the step off. That is what they charge. Now you take the evidence in this case and see what the circumstances surrounding that act were and then you say what a person of reasonable prudence and care would have done under the same or similar circumstances, and whatever a person of ordinary care would have done the law says the plaintiff must do. And you ascertain what a person of ordinary reason, prudence and care, situated and surrounded as the plaintiff was in this specification of negligence. Whatever such a person

would have done, the law says that plaintiff must do. But if the plaintiff failed to do it, and that was negligence on his part, and contributed to his injury, that would not deprive the plaintiff of a right to recover as I shall explain to you hereafter. But if that failure was the sole cause of the injury, unaccompanied by any negligence or carelessness on the part of the railroad company, why the plaintiff could not recover.

Specification (c) in the answer is as follows:

"Plaintiff's intestate failed and omitted to heed the approach of the said passenger train, notwithstanding signals were given by whistle and bell of its approach."

I don't know whether any signals were given by the whistle or bell. You have heard the evidence and you must ascertain that from the evidence. But it is the duty of a person to use his senses of hearing and seeing, and if he [fol. 89] fails to do that, and that was negligence on his part, and that was the sole direct proximate cause of the injury, the plaintiff could not recover. The plaintiff has to use ordinary care for his own safety, such care as a person of ordinary prudence and care would have used under the same or similar circumstances. That is the care the law says the plaintiff must use, and if he fails to use that, and that was negligence, and that was the sole cause of the injury, unaccompanied by any negligence on the part of the defendant, the plaintiff could not recover. But if it was contributory negligence on his part, combining and concurring with the negligence of the defendant as the proximate cause of the injury, that would not prevent him from recovering. I will explain that to you a little later on.

"(d) In failing to look up the said main line track before alighting thereon, or in close and dangerous proximity thereto."

Well, did he fail to look up the track and did he alight in close and dangerous proximity to the train? I don't know whether he did or not. But under that act of negligence, I can only repeat that the plaintiff was required to use such care as a person of ordinary care and prudence would have used under the same or similar circumstances.

The law says he must do under those circumstances what a person of ordinary care and prudence would have done, and if he failed to, and that was negligence and that was the sole direct cause of the injury, the plaintiff could not recover. But if it was negligence and contributed to the injury as the direct and proximate cause, that would not prevent him from recovering. Under those circumstances, he was required to use such care as a person of ordinary prudence and care would have used under the same or similar circumstances. Now did he alight so close that the train could not be stopped? I don't know. You have heard the evidence, and you must answer that from the evidence. But if he did that and failed to observe due care and that was the sole cause of the injury, he could not recover.

[fol. 90] Now the ninth paragraph sets up assumption of risk, and the law in regard to that is this: whenever a Master employs a Servant,—and when I say Master, I mean the Railroad Company, and when I say Servant, I mean the deceased,—whenever a Master employs a Servant, the Servant assumes all the risks ordinarily incident to the work that he is employed to do. That is just as binding on the Servant as a written contract. He assumes all ordinary risks. He does not assume any extraordinary hazards or risks, just those risks connected with his work. And if the death of the deceased was caused by an ordinary risk, he assumed that. If that was the cause of his death he assumed that.

Now that is about the law as I see it that covers this case, except to say to you that under this Federal Act under which this case is being tried, and about which there is no dispute, contributory negligence on the part of the plaintiff would not prevent the plaintiff from recovering. Under our state law that would prevent him from recovering, but under this Federal Act it does not. But the law says that the jury must apportion the negligence. That is to say, suppose you were to conclude from the evidence in this case that the plaintiff was entitled to recover nine hundred dollars damages, and you were to conclude that the plaintiff was guilty of as much negligence as the defendant, half and half. Then you would have to apportion that nine hundred dollars, and say the plaintiff would be entitled to

four hundred and fifty dollars. If the plaintiff was guilty of one-third of the negligence and the defendant two-thirds, the plaintiff would be entitled to recover two-thirds of nine hundred dollars. So under this Federal Law you have to apportion the negligence. You first say how much damages the plaintiff should receive; suppose you say nine hundred dollars; and if the plaintiff was *as* guilty of as much negligence as the defendant, the plaintiff would be entitled to four hundred and fifty dollars.

Now there is only one of two ways that the plaintiff can be deprived of his right to recover in a case like this and [fol. 91] one of those ways is this. Where the negligence of the plaintiff was the sole cause of the injury, or in this case his death; if the death of the deceased was caused by his own negligence unaccompanied by any negligence on the part of the defendant the plaintiff could not recover. And neither could the plaintiff recover if his death was due to one of the risks that are ordinarily incident to the work he was hired to do because he assumes such risks. Those are the only two ways that the plaintiff can be deprived of his right to recover. That is about the law as I see it that covers the whole case. I may say to you that you cannot give anything but actual damages in this case. Under this act you cannot give punitive damages at all.

Now I have been requested to charge you.

1. I refuse to charge you the defendants' first request to charge.

The second I will talk to you about later, and the fourth I will talk to you about later. The fifth I refuse to charge.

Now gentlemen, in estimating the damages, if you conclude that the plaintiff is entitled to anything it would be wrong for you to take into consideration the question of sympathy. The wife and children were here in court, and that may have made a wrong impression on you. It would be contrary to law for you to take into consideration sympathy in estimating damages and you can see the reason for that very easily. It would be wrong for you to make somebody else pay for your sympathy. You might be willing to put out two or three hundred dollars to pay for your sympathy but it would be wrong to make someone else pay for it. This is just a cold business proposition. You shut your eyes to everything you have heard except the testi-

mony and the law as I have given it to you. Whenever people can't settle their difficulties outside of the court, the law has prescribed this tribunal to settle them. On one side is the judge who handles the law, and on the other side is the jury who handles the facts, the judge and the jury must settle it.

[fol. 92] A mortuary table has been introduced in evidence and that means this: you take the age of the person at the time of his death and that table tells you how many more years he is expected to live had he not died. But you are not bound by that table. You give it such weight as you think it is entitled to. Under that table a person of the age of 28 is expected to live so many more years before he dies; that is not binding on you. You give that such weight as you think it is entitled to. Use your good common sense and judgment about it. And in consideration of that it would be your duty to take into consideration if the deceased had lived, if he would have made six dollars and some cents the balance of his life. You take into consideration whether the man would have lived, and if he would have a job every day at six dollars and some odd cents a day, as the testimony shows. You have to use your senses about that. That table is not binding on you. You give it such weight as you think it is entitled to, that is all.

Now I have been requested to charge you several requests by the defendant. The first I refuse.

2. I charge you that.

3. I charge you that. That means very nearly this; what was the commercial value of the deceased to his family, what was he worth to them?

4. I charge you that.

5. I refuse to charge you that.

6. I charge you that.

That is about the law as I see it that covers this whole case, except to tell you that the plaintiff must prove her case by the greater weight or preponderance of the evidence, that is to say, if the testimony in support of the plaintiff's cause of action is an even balance with that opposed to it, the plaintiff could not recover, because the law says his testimony must outweigh, go down, be heavier than that opposed to it. And that same rule applies to the defendant on the question of contributory negligence and as-

sumption of risk. Both of these defenses must be proved [fol. 93] by the greater weight or preponderance of the evidence. The evidence in support of contributory negligence and assumption of risk must preponderate over that opposed to it, if that be so those two defences would be made out and the plaintiff could not recover as to assumption of risk. But he could recover as to contributory negligence because I told you that there were only two ways by which the plaintiff could be deprived of his right to recover, by showing that his death was caused by his sole negligence unaccompanied by any negligence on the part of the defendant, or that his death was caused by one of the risks ordinarily incident to the work he was employed to do. I believe that I stated to you that you cannot bring in any punitive damages or any damages for pain and suffering.

Mr. Meyer: The plaintiff could not recover unless they prove their case by the greater weight of the evidence.

Court: I have told the jury that.

If you conclude that the plaintiff is entitled to recover, say "We find for the plaintiff" so many dollars, writing it out in words and not in figures, and sign your name as foreman. If you conclude that the plaintiff is not entitled to recover, say "We find for the defendant" and sign your name as foreman. All you want to do is what is right and just under the law and the evidence. Whenever you have done that, you have done your duty.

Mr. Figg: I would like to call your honor's attention to the fact that there is no evidence that any speed rules or regulations were violated by the defendant in this case. In connection with the second specification your Honor charged that might be negligence.

Court: It does not make any difference whether there are any speed rules, the railroad company had no right to run its train at a high and reckless rate of speed. What specification of negligence is that, the second? I told them I was not going to charge them anything about the rules and regulations because there were no rules introduced.

[fol. 94] Mr. Figg: I ask your Honor to charge that there is no evidence to support that specification.

Court: I won't charge them about the rules, I charge them it is wrong to run at a high and dangerous rate of

speed, rule or no rule. I won't say a word about rules, no rules have been introduced here. If you listen to the charge, you will see I have covered it pretty closely.

What I have said about the Coast Line applies to the engineer Brandt because his answer is the same as the Coast Line, so there is no use to charge you all over again.

Write your verdict on the back of this paper I have made a mark on.

The Foreman: Your Honor, do we have to find against one or both of the defendants?

Court: You have it in your power to bring in a verdict against one or both of them.

VERDICT

The jury retired to deliberate, and later returned with a verdict for the plaintiff in the amount of Twenty-Five Thousand ($25,000.00) Dollars. Motion for a new trial was duly noted and argued during the said term, and was marked "Heard" by Judge DeVore and taken under advisement. The grounds for the motion were as follows, to wit:

GROUNDS OF MOTION FOR NEW TRIAL.

1. That the verdict was against the weight of the evidence, in that,

(a) weight of evidence shows that defendants, or either of them, were not negligent, etc.

(b) weight of evidence shows that deceased assumed risk, by stepping in front of, or into, train without looking.

(c) only negligence, if any, shown in testimony was that of deceased.

2. That the verdict was excessive,

(a) even if defendants were negligent, and deceased not contributorily negligent.

[fol. 95] (b) because deceased was guilty of gross contributory negligence, and yet jury allowed a full recovery, whereas in any event, considerable diminution should have been made for contributory negligence of deceased.

3. That there was error in not granting defendants' motion for non-suit.

4. That there was error in not granting defendants' motions for directed verdict.

5. That there was error in charging in connection with plaintiff's specification of negligence lettered (b): in substance: That it was a violation of law to run the train at a rate of speed in excess of the speed rules and regulations in the yard limits,

because (a) the rules and regulations proved showed the limit of 50 miles an hour, and the testimony fixed the maximum speed of the train at 50 miles an hour.

(b) defendants' counsel moved to correct the court's statement of this issue, which motion was refused by the court.

(c) the court charged the jury that there *was* no rules and regulations in evidence as to speeds, whereas the plaintiff put in evidence the defendant railroad company's instructions to its employees, showing the maximum rule as 50 miles an hour.

6. There was error in the charge, in that the court charged the jury that it might be negligence for the defendant railroad company to allow shrubbery and bill boards, etc., to remain on its right-of-way so as to obstruct the view of deceased toward the train, and then charged further that the same charge would apply to plaintiff's specification lettered (n) if the bill boards and shrubbery were not on the right-of-way or land of the defendant but on the lands of another; and

Further because there was no evidence that there were any bill boards and shrubbery on ths defendant railroad company's right-of-way, but as far as the evidence showed, [fol. 96] the bill boards and shrubbery were, or could have been, wholly on lands of another.

7. That there was error in refusing defendants' motion to strike specification lettered (n) in plaintiff's complaint paragraph 4, made upon the following ground and in the following language (see notice of motion to strike):

"Court: I overrule the motion to strike that out.

"Mr. Figg: We submit that we have nothing to do with obstructions that are not on our land and we therefore ask that that be stricken out.

"Court: I overrule the motion to strike that out.

8. That there was error in the court's charge in the question of assumption of risk, in that the same failed to charge on, or include, risks arising in the progress of the work, which was the kind of risk relied upon by the defendants, to wit:

"The risk of coming into collision with a train upon a track when stepping from the engine upon which he was riding, towards and upon said track, and that said risk was obvious, and was so assumed by plaintiff's intestate as aforesaid."

9. That there was error in refusing to charge defendants' first request to charge.

10. That there was error in refusing defendants' request to charge on the question of assumption of risk numbered V, when the same covered the question of a risk arising in the progress of the work, and also of extraordinary risks, which were not covered by the general charge of the court on that question.

11. That the court erred in charging that the deceased did not assume "extraordinary hazards or risks," whereas the law is that a Servant assumes such extraordinary hazards and risks arising in the course or progress of the work when he knows of the risk or danger, or by the exercise of due care and precaution he should have known of the risk, in which latter case he assumes it as though he had known it.
[fol. 97] (See case of Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, especially pages 503-505.)

12. That there was error in the court's frequent use of the phrase "violation of law" in connection with the specifications of negligence alleged against defendants, whereas there were neither alleged nor approved any violations of

law by defendants, and the issues were simply the use of due care on the part of the defendants.

Rutledge, Hyde, Mann & Figg, Defendants' Attorneys.

On January 2, 1926, Judge DeVore filed the following order, overruling the motion for a new trial:

ORDER REFUSING NEW TRIAL

This case was tried by me and a jury at the fall term of Court for the above County, 1925, and the jury rendered a verdict therein for the plaintiff. Thereafter a motion for a new trial was made by the defendants based on the several grounds hereto attached. After considering these grounds, I am of the opinion that the motion should be refused. It is therefore ordered that all the grounds upon which the motion is made be and the same are overruled and the motion for a new trial be and the same is hereby refused.

(Signed) J. W. De Vore, Circuit Judge, Who Heard the Motion.

Dated Edgefield, S. C., December 31, 1925.

Within the time allowed by law, defendants' counsel served notice of intention to appeal, and thereafter within due time served the foregoing Case and the following exceptions for the purpose of this appeal.

[fol. 98] EXCEPTIONS

1. The presiding Judge erred in refusing defendants' motion for a non-suit made at the close of the plaintiff's testimony on the ground that there is no sufficient evidence in the case to prove any actionable negligence on the part of the defendant Atlantic Coast Line Railroad Company, or the engineer, Brandt, or either.

2. The presiding Judge erred in refusing defendants' motion for a non-suit made at the close of the plaintiff's testimony on the ground that the whole of the evidence shows that the death of the deceased was due to an unavoidable accident, and due to the fault or negligence of neither of the defendants.

3. The presiding Judge erred in refusing defendants' motion for a non-suit made at the close of the plaintiff's testimony upon the ground that the injury and death of the deceased were due to and caused solely by the negligence of the deceased in stepping too near to and into the moving train.

4. The presiding Judge erred in refusing defendants' motion for a non-suit made at the close of the plaintiff's testimony upon the ground that the injury and death of the deceased were due to and caused by a risk of his employment assumed by said deceased, that is to say, the risk of coming into collision with the train upon the track in this case when stepping from the engine upon which he was riding towards and upon said track, and that said risk was obvious, or in the exercise of due care and prudence would have been obvious, and was so assumed by him.

5. The presiding Judge erred in refusing defendants' motion for the direction of verdict in favor of defendants made at the close of the testimony in the case on the ground that there is no sufficient evidence in the case to prove any actionable negligence on the part of the defendant Atlantic Coast Line Railroad Company, or the engineer, Brandt, or either.

[fol. 99] 6. The presiding Judge erred in refusing defendants' motion for the direction of verdict in favor of defendants made at the close of the testimony in the case on the ground that the whole of the evidence shows that the injury and death of the deceased were due to an unavoidable accident, and due to the fault or negligence of neither of the defendants.

7. The presiding Judge erred in refusing defendants' motion for the direction of verdict in favor of defendants made at the close of the testimony in the case on the ground

that the injury and death of the deceased were due to and caused solely by the negligence of the deceased in stepping too near to and into the moving train.

8. The presiding Judge erred in refusing defendants' motion for the direction of verdict in favor of the defendants made at the close of all the testimony upon the ground that the injury and death of the deceased were due to and caused by a risk of his employment assumed by said deceased, that is to say, the risk of coming into collision with the train upon the track in this case, when stepping from the engine upon which he was riding towards and upon said track, and that said risk was obvious or in the exercise of due care and prudence by deceased would have been obvious, and was so assumed by him.

9. The presiding Judge erred in refusing to strike from the complaint herein upon defendants' motion the allegations of paragraph 4, subdivision (n), made upon the ground that the said allegations charged defendant railroad company with negligence in respect to the presence of bill boards and shrubbery not on defendant company's land or right-of-way; the error assigned being, that the Atlantic Coast Line Railroad Company is not under the legal duty of removing bill boards and shrubbery not upon its right-of-way, and cannot be charged with negligence for allowing such obstructions to be on lands not belonging to it or not a part of its right of way.

[fol. 100] 10. The presiding Judge erred in permitting the plaintiff's witness, J. J. Mansfield, to testify, over objection by defendants' counsel, as follows:

"Q. What was the condition of the body?

A. Head pretty well decomposed, arm broken, part of his brains out on the ground.

Mr. Figg: We object. This suit is not for any pain and suffering. It is simply for the loss of pecuniary benefits.

Court: Overrule the objection.

Q. Describe the condition of the body?

A. Ground up laying between the Coast Line tracks; head pretty badly decomposed.

Q. What part of the body was broken?

Mr. Figg: I object to all testimony along this line, and move to strike it out, as irrelevant.

Court: I overrule the objection.

Q. All right, answer the question.

A. His head was pretty well ground up, arm broken, also his leg.

Q. Could you tell which arm was broken?

A. I think the left, I am not positive, I noticed part of his brains lying close to the end of the cross ties."

The error assigned being, that this testimony was irrelevant to the issues in this case, and was highly prejudicial to defendants' rights, and should have been excluded and stricken out on motion of defendants' counsel.

11. The presiding Judge erred in overruling motion to strike out the testimony of J. J. Mansfield, plaintiff's witness, as to the gruesome condition, and the mutilation and decomposition of the body of deceased, the error assigned being that said testimony was irrelevant to the issues in this case, and was highly prejudicial to defendants' rights.

12. The presiding Judge erred in overruling defendants' motion that the jury be sent to inspect and examine the scene and location of the accident, the error assigned being that the testimony of plaintiff's witness, McDonald, showed [fol. 101] that the photographs in evidence, or one or several of them, did not portray a true representation of the spot and the bill boards, shrubbery, etc., and in this case, the exact physical location of the accident, and the arrangement of the tracks, alleged obstructions, etc., were highly important to defendants' case, and defendants were entitled to have the jury see the scene of the accident.

13. The presiding Judge erred and committed abuse of discretion in overruling defendants' motion that the jury be sent to examine the scene and location of the accident in this case, in that, in view of the importance to defendants' case of the actual physical situation at the point of the accident, and the great bearing which this had on the peculiar issues in this case, the defendants were entitled to have the jury examine the scene of the accident, and the presiding Judge should have directed that they go.

14. The presiding Judge erred in refusing defendants' first request to charge, as follows, to wit:

1. I charge you that the whole of the evidence in this case shows that the shrubbery, trees, bill boards and other obstructions to the view of the deceased alleged by the plaintiff in this case, even if a basis for finding the defendant Atlantic Coast Line Railroad Company negligent, were not as a matter of law the proximate cause of the accident to, and death of the plaintiff's intestate, Mr. Driggers, and in passing on this case you cannot find a verdict in favor of the plaintiff based solely upon such alleged negligence.

The error assigned being, that the whole of the evidence showed that the statement of the issues therein contained was correct and proper, and the presiding Judge should have so charged.

15. The presiding Judge erred in refusing to charge defendants' fifth request to charge, as follows, to wit:

5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily [fol. 102] incident to his employment, or which arise in the progress of their work. Some employments are necessarily dangerous and fraught with danger to the workmen, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. If, however, he does actually know and appreciate the danger or risk, or by the exercise of proper care and caution should have

known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover.

The error assigned being, that the said request contained a correct proposition of law, relevant to the defendants' defense of assumption of risk, and not charged elsewhere by the presiding Judge, and defendant was entitled to have said request charged, and was prejudiced by the refusal so to charge.

16. The presiding Judge erred in charging the jury as follows, to wit:

"The next specification is (b):

'In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards.'

[fol. 103] Well, it would be a violation of law for a railroad company to operate its train at a high and dangerous rate of speed, and in excess of that allowed by law, and it would be a violation of law to operate in excess of the rate of speed allowed in the yard; all that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence."

The error assigned being

(a) it is not a violation of law to run trains at any particular speed at the point of the accident;

(b) there is proved a speed regulation of 50 miles per hour, and there is no testimony that the train was exceeding this regulation;

(c) it is no violation of law on the part of defendant Atlantic Coast Line Railroad Company to run at a speed greater than that prescribed in the defendant's alleged rules;

and the presiding Judge erred in charging to the contrary.

17. The presiding Judge erred in charging the jury as follows, to wit:

"The next specification is (b):

'In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards.'

Well, it would be a violation of law for a railroad company to operate its train at a high and dangerous rate of speed, and in excess of that allowed by law, and it would be a violation of law to operate in excess of the rate of speed allowed in the yard; all that may be negligence and carelessness in the defendant, and if *it* that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence."

[fol. 104] The error assigned being, that the presiding Judge should have left it to the jury to say whether the things alleged in said specification of alleged negligence constituted under all the circumstances negligence, and in charging as above set forth, he invaded the province of the jury and charged on the facts, contrary to Article V, Section 26 of the S. C. Constitution.

18. The presiding Judge erred in charging the jury as follows, to wit:

"The next specification is subdivision (c):

'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the said train, and so to avoid being run over by it.'

Well, if they did that, that was a violation of law. But whether or not they did that is a question for you to answer from this evidence. If the defendant did that and that was negligence and carelessness and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence."

The error assigned being, that the charge is erroneous in stating to the jury that if defendant did as charged in said subdivision (c) of paragraph 4 of the complaint, that was a violation of law.

20. The presiding Judge erred in charging the jury as follows, to wit:

"The next specification is subdivision (c):

'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of said train, and so to avoid being run over by it.'

Well, if they did that, that was a violation of law, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that and that [fol. 105] was negligence and carelessness and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recovery on that act of negligence."

The error assigned being, that the presiding Judge, in stating to the jury that the railroad company would be violating the law in doing as charged in the portion of the complaint referred to, invaded the province of the jury, and charged on the facts, contrary to the S. C. Constitution, Article V, Section 26.

21. The presiding Judge erred in charging the jury on proximate cause, as follows, to wit:

"In that connection, I charge you that a person or corporation may be guilty of negligence, and no one would be entitled to recover. To illustrate, suppose a man drove up in front of the court house and left his horse without hitching it, that might be negligence; but if no one was hurt, no one could recover. So you must ascertain whether that negligence was the direct and proximate cause of the injury charged."

The error assigned being, that the definition and illustration of proximate cause, the only one given in the charge, is incorrect and erroneous in making the test whether an

injury results from the negligence, rather than instructing the jury on the necessary direct causal connection which must exist, where an injury can be traced back to the negligence charged.

22. The presiding Judge erred in charging the jury as follows, to wit:

"Specification (m):

'In causing and permitting defendant company's right-of-way between the Etiwan Lead and the main track to be obstructed and screened by bill boards, weeds, bushes and shrubbery, so as to deprive the defendant's employees working on trains operating at that point of a clear and unobstructed vision.'

[fol. 106] Well, if the railroad company allowed that to be done as charged in this complaint, that was a violation of law. It was their duty to keep that place unobstructed so as to enable its employees to see trains coming down the railroad track to protect themselves. I don't know if there were any bill boards or shrubs there, and if I knew I couldn't express my opinion to you. You are the ones to say whether they were there, and if they were there, did they deprive the deceased of the opportunity of seeing the train and of protecting himself? That is a question you have to answer. Were those shrubs there; and were they in such a place as to prevent the deceased from seeing the train? If they were there and that was negligence and carelessness in preventing the deceased from seeing the train, and that was the direct and proximate cause of the death of the deceased, he could recover; otherwise he could not. Next specification as to bill boards, (n):

'In failing and omitting to cause the land between the defendant's main tracks and an important and frequently used spur track to be kept clear and free of bill boards and shrubbery and other obstructions, so as to enable the employees of the defendant on a train approaching the main tracks along such spur track to see an approaching south bound train on the main track.'

What I have said to you with reference to specification (m) applies to that. They both apply to the same specification of negligence.".

The error assigned being, that in charging the jury that it was the duty of the railroad company to keep "that place unobstructed so as to enable employees to see trains coming down the railroad track to protect themselves," and in charging that it was a violation of law for the railroad company to do as it is charged with doing in specifications (m) and (n) of paragraph 4 of the complaint, the presiding Judge invaded the province of the jury and charged on [fol. 107] the facts, contrary to the provisions of Article V, Section 26, of the Constitution of South Carolina.

23. The presiding Judge erred in charging the jury as follows, to wit:

"Specification (m):

'In causing and permitting defendant company's right-of-way between the Etiwan Lead and the main track to be obstructed and screened by bill boards, weeds, bushes and shrubbery, so as to deprive the defendant's employees working on trains operating at that point of a clear and unobstructed vision.'

Well, if the railroad company allowed that to be done as charged in this complaint, that was a violation of law. It was their duty to keep that place unobstructed so as to enable its employees to see trains coming down the railroad track to protect themselves. I don't know if there were any bill board or shrubs there, and if I knew I couldn't express my opinion to you. You are the ones to say whether they were there, and if they were there, did they deprive the deceased of the opportunity of seeing the train and of protecting himself. That is a question you have to answer. Were those shrubs there; and were they in such a place as to prevent the deceased from seeing the train? If they were and that was negligence and carelessness in preventing the deceased from seeing the train, and that was the direct and proximate cause of the death of the deceased, he could recover; otherwise he could not."

"Next specification as to bill boards, (n):

'In failing and omitting to cause the land between the defendant's main tracks and an important and frequently used spur track to be kept clear and free of bill boards and shrubbery and other obstructions, so as to enable the employees of the defendant on a train approaching the main

tracks along such spur track to see an approaching south bound train on the main track.'

[fol. 108] What I have said to you with reference to specification (m) applies to that. They both apply to the same specification of negligence."

The error assigned being, that the said charge with reference to specification (n) puts on the defendant railroad company the legal duty of keeping clear all lands between a side or spur track and the main line track, whether on or off the defendant's right of way, or on or off defendant's lands, and charges defendant railroad company with negligence in not clearing off the lands of others than the railroad company, whereas the law is that the railroad company can only, in any event, be charged with negligence in respect to the alleged obstructions on its own right-of-way, and lands.

24. The presiding Judge erred in charging the jury as follows, to wit:

"Specification (m):

'In causing and permitting defendant company's right-of-way between the Etiwan Lead and the main track to be obstructed and screened by bill boards, weeds, bushes and shrubbery, so as to deprive the defendant's employees working on trains operating at that point of a clear and unobstructed vision.'

Well, if the railroad company allowed that to be done as charged in this complaint, that was a violation of law. It was their duty to keep that place unobstructed so as to enable its employees to see trains coming down the railroad track to protect themselves."

The error assigned being, that it was error of law to charge that the failure and ommission to cause the land between the spur track and the main line track to be kept free from bill boards and shrubbery, etc., was a violation of law on the part of the railroad company, and said charge was highly prejudicial.

25. The presiding Judge erred in charging the jury as follows, to wit:

[fol. 109] "Now the 9th paragraph sets up assumption of risk and the law in regard to that is this: whenever a Mas-

ter employs a Servant, and when I say Master, I mean railroad company, and when I say servant, I mean the deceased, whenever a Master employs a Servant, the Servant assumes all the risks ordinarily incident to the work that he is employed to do. That is just as binding on the Servant as a written contract. He assumes all ordinary risks; he does not assume any extraordinary hazards or risks, just those risks connected with his work. And if the death of the deceased was caused by an ordinary risk he assumed that; if that was the cause of his death he assumed that."

The error assigned being, that the charge is erroneous in stating that the Servant never assumes extraordinary risks and hazards, in the course of his employment, whereas the law is, and the presiding Judge should have charged, that the Servant assumes not only risks ordinarily incident to his employment, but in addition thereto, extraordinary risks and hazards which may or do arise in the progress of the work, where he actually knows and becomes aware of the risk and danger, or an ordinarily prudent person would have known and appreciated the risk and danger.

26. The presiding Judge erred in refusing to correct his statement of the issues in the case as requested by defendants' counsel, as follows, to wit:

Mr. Figg: I would like to call your Honor's attention to the fact that there is no evidence that any speed rules or regulations were violated by the defendant in this case. In connection with the second specification of negligence, your Honor charged that might be negligence.

Court: It does not make any difference whether there are any speed rules, the railroad company had no right to run its train at a high and reckless rate of speed. What specification of negligence is that, the second? I told them [fol. 110] I was not going to charge them anything about the rules and regulations because there were no rules introduced.

Mr. Figg: I ask your Honor to charge that there is no evidence to support that specification.

Court: I won't charge them about the rules. I charge them it is wrong to run at a high and dangerous rate of speed, rule or no rule. I won't say a word about rules,

no rules have been introduced here. If you listen to the charge, you will see that I have covered it pretty closely.

The error assigned being, that there was no evidence that the train was exceeding 50 miles an hour, there was proved by plantiff a regulation of 50 miles an hour at the point of the accident, and the presiding Judge erred in stating that there was no rule proved as to speed, and in refusing to charge the jury that there was no evidence that the train was exceeding any speed regulations, at the time of the accident.

27. The presiding Judge erred in charging the jury that it was wrong for the defendant railroad company to run its trains at a high and dangerous rate of speed, the error assigned being that railroad companies have the right to run at a high and often dangerous rate of speed, and it is for the jury to say whether under the circumstances of any case the railroad company was wanting in due care in regard to the rate of speed at which its train was running.

28. The presiding Judge erred in instructing the jury that the defendant company had no right to run its train at a high and dangerous rate of speed, the error assigned being that it is for the jury to say whether running at a high and dangerous rate of speed was negligence in any particular case, and in so charging the presiding Judge charged on the facts.

29. The presiding Judge erred in stating to the jury at the close of his charge the following, to wit:

[fol. 111] "Mr. Figg: I ask your Honor to charge that there is no evidence to support that specification.

Court: I won't charge them about the rules. I charge them that it is wrong to run at a high and dangerous rate of speed, rule or no rule. I won't say a word to them about rules, no rules have been introduced here. If you listen to the charge, you will see that I have covered it pretty closely."

The error assigned being, that it appeared by testimony and by the rules introduced by plaintiff in the instructions to the train crew contained in the schedules that there was a speed regulation of 50 miles an hour, and defendants were

entitled to the instruction asked, and the presiding Judge erred in stating the evidence to the contrary.

30. The presiding Judge erred in stating to the jury at the close of his charge the following, to wit:

"Mr. Figg: I ask your Honor to charge that there is no evidence to support that specification.

Court: I won't charge them about the rules. I charge them that it is wrong to run at a high and dangerous rate of speed, rule or no rule. I won't say a word about rules, no rules have been introduced here. If you listen to the charge, you will see that I have covered it pretty closely."

The error assigned being, that in not leaving to the jury the question whether it was wrong for the defendant company to run its trains at a high rate of speed, the presiding Judge invaded the province of the jury and charged on the facts, contrary to Article V, Section 26, of the S. C. Constitution.

31. The presiding Judge erred in overruling defendants' motion to set aside the verdict herein and grant defendants a new trial, made upon the following grounds, to wit:

[fol. 112] 1. That the verdict was against the weight of the evidence, in that,

(a) weight of evidence shows that defendants, or either of them, were not negligence, etc.

(b) weight of evidence shows that deceased assumed risk, by stepping in front of, or into, train without looking.

(c) only negligence, if any, shown in testimony was that of deceased.

2. That the verdict was excessive,

(a) even if defendants were negligent, and deceased not contributorily negligent.

(b) because deceased was guilty of gross contributory negligence, and yet jury allowed a full recovery, whereas in any event, considerable diminution should have been made for contributory negligence of deceased.

3. That there was error in not granting defendants' motions for non-suit.

4. That there was error in not granting defendants' motions for directed verdict.

5. That there was error in charging in connection with plantiff's specification of negligence lettered (b); in substance:

That it was a violation of law to run the train at a rate of speed in excess of the speed rules and regulations in the yard limits, because

(a) the rules and regulations proved showed the limit of 50 miles an hour, and the testimony fixed the maximum speed of the train at 50 miles an hour.

(b) defendants' counsel moved to correct the court's statement of this issue, which motion was refused by the court.

(c) the court charged the jury that there was no rules and regulations in evidence as to speeds, whereas the plain-[fol. 113] tiff put in evidence the defendant railroad company's instructions to its employees, showing the maximum rule as 50 miles an hour.

6. There was error in the charge, in that the Court charged the jury that it might be negligence for the defendant railroad company to allow shrubbery and bill boards, etc., to remain on its right-of-way so as to obstruct the view of deceased toward the train, and then charged further that the same charge would apply to plaintiff's specification lettered (n) if the bill boards and shrubbery were not on the right-of-way or land of the defendant but on the lands of another; and

Further because there was no evidence that there were any bill boards and shrubbery on the defendant railroad company's right-of-way, but as far as the evidence showed, the bill boards and shrubbery were, or could have been, wholly on lands of another.

7. That there was error in refusing defendants' motion to strike specification lettered (n) in plaintiff's complaint paragraph 4, made upon the following ground and in the following language (see notice of motion to strike):

"Court: I overrule the motion to strike that out.

"Mr. Figg: We submit that we have nothing to do with obstructions that are not on our land and we therefore ask that that be stricken out.

"Court: I overrule the motion to strike it out."

8. That there was error in the Court's charge on the question of assumption of risk, in that the same failed to charge on, or include, risks arising in the progress of the work, which was the kind of risk relied upon by the defendants, to wit:

"The risk of coming into collision with a train upon a track when stepping from the engine upon which he was riding, towards and upon said track, and that said risk was so assumed by plaintiff's intestate as aforesaid."

[fol. 114] 9. That there was error in refusing to charge defendants' first request to charge.

10. That there was error in refusing defendants' request to charge on the question of assumption of risk numbered —, when the same covered the question of a risk arising in the progress of the work, and also of extraordinary risks, which were not covered by the general charge of the Court on that question.

11. That the Court erred in charging that the deceased did not assume "extraordinary hazards or risks," whereas the law is that a servant assumes such extraordinary hazards and risks arising in the course or progress of the work when he knows of the risk or danger, or by the exercise of due care and precaution he should have known of the risk, in which latter case he assumes it as though he had known it.

(See case of Seaboard Air Line R. R. Co. vs. Horton, 233 U. S. 492, especially pages 503-505.)

12. That there was error in the Court's frequent use of the phrase "violation of law" in connection with the specifications of negligence alleged against defendants, whereas there were neither alleged nor proved any violations of law by defendants, and the issues were simply the use of due care on the part of the defendants.

Respectfully submitted.

Hyde, Mann & Figg, Attorneys for Appellants.

AGREEMENT RE CASE AND EXCEPTIONS

We, the undersigned, attorneys for defendants—appellants, and plaintiff-respondent, hereby agree that the fore-

going Case and Exceptions shall constitute the Case and Exceptions for the purposes of the appeal herein.

Hyde, Mann & Figg, Attorneys for Defendants-Appellants. Shimel & Rittenberg, Stoney & McGowan, J. D. E. Meyer, Attorneys for Plaintiff-Respondent.

[fol. 115] In Supreme Court of South Carolina

Case No. 206

Marcella Driggers, as Administratrix of the Estate of Wm. A. Driggers, Deceased, Plaintiff Respondent,

v.

Atlantic Coast Line Railroad Company, a Corporation, and M. H. Brandt, Defendants-Appellants.

Appeal from Charleston County, J. W. De Vore, Judge

Affirmed

Hyde, Mann & Figg, of Charleston, for appellant.

Shimel & Rittenberg, Stoney & McGowan, and J. D. E. Meyer, all of Charleston, for respondent.

Opinion—Filed March 28, 1928

Watts, C. J.:

"The judgment from which this appeal is taken is one entered upon the verdict of a jury rendered in the Court of Common Pleas for Charleston County on November 12th, 1925, in the amount of Twenty-five Thousand ($25,000.00) Dollars and costs.

Statement

This is an action for damages in the amount of One Hundred Thousand ($100,000.00) Dollars, brought in the Court of Common Pleas for Charleston County, under the Federal Employers Liability Act, and an amended (United States Compiled Statutes, Sections 8657-8665) by the plaintiff as administratrix of William A. Driggers, deceased,

for the benefit of herself as the widow of the said William A. Driggers, and of her two children. The action is against the defendants, Atlantic Coast Line Railroad Company and M. H. Brandt, and in the pleadings and at the trial it was admitted by both plaintiff and defendants that at the time of the accident to, and injuries and death of the deceased, both the deceased and the defendants were engaged in Interstate Commerce, and that the action was brought and maintained under the Federal Employers Liability Act, as amended, as aforesaid."

The appellant states the questions involved as follows:

"(1) There was no evidence of actionable negligence on the part of the defendants which was a proximate cause of the death of plaintiff's intestate.

(2) Plaintiff's intestate assumed, as a matter of law, the risk of injury by coming into collision with a train on the main line track when he stepped toward or upon said track, the risk and danger being obvious and apparent, or would have been to an ordinarily prudent person under the circumstances.

[fol. 116] (3) Refusal to strike an allegation in the complaint charging the defendant railroad company with negligence in respect to the presence of bill boards and shrubbery not on defendant company's land or right of way in charging the jury that the railroad company owed a duty to keep such places unobstructed and that the jury might find negligence in that respect.

(4) Refusal to charge that under the evidence the presence of alleged obstructions to the view of the deceased, even if negligence, could not, as a matter of law, be the proximate cause of the death of the plaintiff's intestate.

(5) Refusal to charge a proper request on assumption of risk.

(6) Error in charging that a servant does not assume any extraordinary hazards or risks.

(7) Refusal to send the jury to the scene of the accident and abuse of discretion in overruling defendant's motion that the jury be so sent.

(8) Error in charging that the defendants would be guilty of a violation of law in running their trains at a high and dangerous rate of speed.

(9) Error in charging that the defendants would be guilty of a violation of law in running a train at an excessive rate of speed.

(10) Error in charging that it was a violation of law to allow bill boards and shrubbery to obstruct the view of the main line tracks.

(11) Error in charging that it was wrong to run a train at a high or dangerous rate of speed, rule or no rule.

(12) Error in charging on the facts with reference to the rate of speed of trains.

(13) Error in charging on the facts with reference to the presence of alleged obstructions near the track.

(14) Error in refusing to hold the verdict was against the weight of the evidence, and was excessive.''

The exceptions raising the question that the Court was in error in not granting a non suit or directing a verdict as asked for by the defendants made on the ground that there was no actionable negligence on the part of the defendants, which was the proximate cause of the death of plaintiff's intestate, we think there was plenty of evidence in the case to justify his Honor's rulings.

The rule for the direction of a verdict in South Carolina has been repeatedly announced as follows:

''Under the well-settled rule, if there was any evidence tending to support the defense interposed by defendant, the trial judge could not properly have directed a verdict. Under the equally well-settled rule, on such motion defendant was entitled to have the evidence considered and construed most strongly in his favor.'' Brooks v. Floyd, 121 S. C., 356.

See also:

Wilson v. A. C. L. Railway, 134 S. C., 31;
Miller v. A. C. L. Railway, 138 S. C., 675.

[fol. 117] This has been again stated in the case of Lower Main Street Bank v. Caledonian Insurance Company, 135 S. C., 155; 133 S. E., 553, at page 555:

"The well established rule in this State is that if there is any testimony whatever to go to the Jury on an issue involved in a cause, or even if more than one inference can be drawn from the testimony, then it is the duty of the Judge to submit the case to the Jury. This is true even if witnesses for plaintiff contradict each other or if a witness himself in his testimony makes conflicting statements."

These exceptions are overruled. It was properly submitted to the jury whether the defendants furnished the deceased a safe place to work.

"On a track where his vision was obstructed by billboards, shrubbery and bushes, and the failure on the part of the engineer to slacken his speed, blow his whistle, keep a proper lookout or to take any precaution to keep his train under control at a place where he knew constant switching was going on, and his failure to take such precaution in the face of the signal he could have seen Conductor McDonald giving to plaintiff's intestate, were acts of negligence, and, certainly, were questions to be submitted to a jury to determine whether or not they constituted negligence."

Mann v. Seaboard Air Line Railway Company, 138 S. C., page 241; 136 S. E., page 234.

Kirkland v. Southern Railway Company, 128 S. C., page 47; 121 S. E., page 594. Certiorari denied; 264 U. S., 594.

Padgett v. Seaboard Air Line Railway Company, 99 S. C., page 364; 83 S. E., page 633. Affirmed by United States Supreme Court; 236 U. S., page 668.

Squire v. Southern Railway Company, 109 S. C., page 400; 96 S. E., page 152.

Thornton v. Seaboard Air Line Railway Company, 98 S. C., page 348; 82 S. E., page 433.

Dutton v. Atlantic Coast Line Railroad Company, 104 S. C., page 16; 88 S. E., page 263. Affirmed by United States Supreme Court; 245 U. S., page 637.

In the Dutton case, supra, affirmed by the United States Supreme Court, this Court held that the "scintilla of evidence" rule is applicable to cases brought under the Employers' Liability Act and that the same rule of procedure applies to the administration of that Act in the State Court as it does to the administration of State Laws.

Free v. Southern Railway Company, 78 S. C., page 57; 58 S. E., page 952.

In the case of Free v. Southern Railway Company, supra, this Court said, through Mr. Justice Woods:

"As Free was returning across the tracks with water, his attention attracted by an approaching freight train, he was struck and killed by a switch engine coming from the opposite direction on another track. Witnesses variously estimated the speed of the switch engine at from 20 to 35 miles an hour, and they all testified there was no watchman on its pilot, and no warning of its approach by bell or whistle. From this evidence the jury might well infer the defendant was negligent in running its switch engine at such a rate of speed in a yard where there were several tracks and the confusion of other moving trains, without a guard on the pilot and without signals, and that, in these [fol. 118] circumstances, the unfortunate boy in crossing the track in the discharge of the duty assigned to him was not guilty of contributory negligence in not seeing the engine and getting out of its way."

As to failure to apprehend danger when train is not running on schedule time, see, Wrightsville & T. R. Company v. Gornto (Ga.), 58 S. E., page 770. Seaboard Air Line Railway Company v. Hollis (Ga.), 93 S. E., pages 264, 267.

The question whether or not these acts, if they constituted negligence, individually or jointly and concurrently, were the proximate cause of the death of plaintiff's intestate, presented questions of fact for the jury to determine, and the Court properly submitted these questions of fact for their determination, and they resolved them in favor of the plaintiff:

Milwaukee Railway Company v. Kellog, 94 U. S., page 469; 24 L. E., page 256.

Cooper v. Richland County, 76 S. C., page 202; 56 S. E., page 958.

Thompson v. Seaboard Air Line Railway Company, 78 S. C., page 384; 54 S. E., page 1094.

In the Milwaukee-Kellog case, supra, the Court said:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it."

In the Thompson case, supra, our Supreme Court, through Chief Justice Pope, says: "Suffice it to say here that the question of proximate cause is one peculiarly within the province of the jury."

We think that the assumption by the deceased was properly submitted to the jury under the cases of:

McAlister v. Southern Railway Company, 130 S. C., page 458; 126 S. E., page 627. Certiorari denied 266 U. S., 632; 69 L. Ed., 478.

Hudson v. Atlantic Coast Line Railroad Company, 123 S. C., page 488; 124 S. E., page 584.

Lorick v. Seaboard Air Line Railway Company, 86 S. E., page 675; 102 S. C., page 276. Affirmed by the United States Supreme Court, 243 U. S., 572; 61 L. Ed., 907.

Penlergrass v. Southern Railway Company, 114 S. C., page 78; 103 S. E., page 150.

Hankinson v. Charleston & W. C. Ry. Company, 94 S. C., page 150; 77 S. E., page 853.

Hall v. Northwestern R. Co. of S. C., 81 S. C., page 522; 62 S. E., page 848.

His Honor was not in error in refusing to strike out that part of the complaint charging the defendant Company with negligently permitting the presence of bill boards, shrubbery and bushes. That was a question for the jury whether on railroad property or elsewhere. If they were there, whether on the company's property or elsewhere, and obstructed the view, and the Company knew it, it was properly submitted whether under all the facts of the case

whether the Company was negligent operating its trains at that particular point so as not to endanger anyone.

Wideman v. Hines, 117 S. C., 516.

[fol. 119] It was a question for the jury whether, "it was negligent on the part of the defendants to require Driggers to work on a railroad track where his vision would be obstructed by bill-boards, shrubbery and bushes, regardless of the fact that the company might have no control over the land on which they were located, because whether or not the company had control over that land it was its duty to furnish Driggers with a place at which he could safely work, and which was not obstructed by billboards, shrubbery and bushes.

The language quoted by the defendants from Ruling Case Law under this point (22 R. C. L., 995) is found under a section which discusses the rights between the railroad company and travelers at crossings, and does not in any way cover the question when these obstructions make unsafe the place at which the company's employees are required to work. On the other hand, the principle of the master's liability for dangerous conditions created by third persons near the place of work, as a breach of the duty to provide a reasonably safe place to work, is well established by a number of decisions in the several states.

Boston & M. R. R. v. Brown, 218 Fed., 625.

Doyle v. Toledo S. & M. Ry. Company, 127 Mich., page 94; 86 N. W., page 524.

Pittsburg, etc., Railway Company v. Parish, 28 Ind. App., 189; 62 N. E., 514.

Devine v. Delano, 277 Ill., 166; 111 N. E., 742.

Clarke v. Union Iron & Foundry Company, 234 Mo., page 436; 137 S. W., page 577.

In Boston & M. R. R. v. Brown, supra, the Court of appeals of the first circuit, reviewing a case in which a brakeman was knocked off the top of a moving freight car by a bridge near Lawrence, Mass., said:

"Although, according to the evidence, this bridge was unusually low and maintained, not by the defendant (the railroad), but by the City of Lawrence, this did not entitle

the defendant to the requested instructions that the railroad could not be held negligent with respect to its height. If the passage beneath it was not reasonably safe under all the circumstances, the railroad might still be negligent in continuing to permit the passage of trains beneath it while in such condition."

In Doyle v. Toledo, S. & M. Ry. Company, supra, it was held that it is the duty of a railway company to see that a building over its switch-track is reasonably safe for employees whose duties call *call* them thereunder, though the building belongs to third persons. In that case the building was the shed of a lean-to, a brick kiln near the railroad's switchtrack. The railroad had no control over it. The Court based its holding squarely on the doctrine that the railroad owed a duty to provide a reasonably safe place to work and reversed the trial Court which had directed a verdict for defendant.

In Devine v. Delano, supra, the principle was applied to an obstruction alongside the track of the railroad on the premises of a manufacturing plant, the Court saying that if the railroad company had no such control as to be able to remove such dangerous conditions itself, it had to make some arrangements with the owners to change the conditions or had to stop switching at that point.

In Clarke v. Union Iron & Foundry Company, supra, the Missouri Supreme Court held that one who contracts to erect a building in close proximity to wires carrying a heavy electrical current owes his employees the duty of determining whether or not the insulation is safe, although his contract gives him no authority over the poles or wires or the space by them. The Court says:

[fol. 129] "The test is not that the place within itself is reasonably safe, but it must be reasonably safe from all internal and external dangers which are liable to do injuries to the servant."

His Honor properly submitted to the jury whether on all the facts and circumstances whether or not there was actionable negligence on the part of appellants, and whether or not that was the proximate cause of the death of plaintiff's intestate.

On the question of assumption of risk the Court charged as follows:

"And there is a corresponding duty on the servant. The servant has a right to assume that the master has furnished him a reasonably safe place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the master has performed his duty. But if the place is dangerous—obviously dangerous, and can be seen by the servant, and he goes on and performs his duty after knowing that, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you, you could see it and knew it, and you undertook to work in that place and you got hurt it would be your fault. Whether that happened in this case I don't know."

In the light of the full instructions given on this point, there was no likelihood of the jury's being misled.

His Honor, the trial Judge, instructed the jury that a servant could not hold the master liable if the place was obviously dangerous and he undertook to work there, and that it was a risk which he assumed, and could not recover as a result of any injuries sustained by him by reason of the assumption of such risk.

Booth v. J. G. White Engineering Company, 101 S. C., page 483; 86 S. E., page 32.

Harwell v. Columbia Mills, 112 S. C., page 177; 98 S. E., page 324.

Mann v. Seaboard Air Line Railway Company, 138 S. C., page 241; 136 S. E., page 234.

The Court properly refused to send the jury to the place where Driggers was killed, and properly exercised its discretion in not requiring the jurors to go there after the jurors advised his Honor that they did not care to go.

Bodie v. Charleston & W. C. Ry. Company, 66 S. C., 302; 44 S. E., 943.

Parrott v. Barrett, 81 S. C., 255; 62 S. E., 241.

In the Bodie case, supra, this Court said:

"The jury informed his Honor, the presiding Judge, that they had decided that it would be of no benefit to them to visit the place where the accident occurred. It was wholly within the discretion of the presiding Judge whether he would send the jury to view the place where the injury occurred, and, under the circumstances, his discretion was properly exercised."

His Honor's language as complained of in charging that certain conduct alleged was in violation of law has given me some trouble but a careful reading of his charge as a whole convinces me that it was a slip of the tongue and not prejudicial.

[fol. 121] His Honor instructed the jury that the specifications of negligence as charged in the complaint not complied with, were a non observance of the law and if the jury believed that plaintiff could recover. It was unfortunate that he used the words in violation of law, but taking his charge as a whole, it was eminently fair and not prejudicial, because the jury could not have inferred from it that appellant was guilty of violating any criminal law or statute.

"They charged that the law required the defendants to do certain things, as specified therein, and that they failed to comply with the same, and that they, therefore, became liable for whatever damages the plaintiff sustained as a result of the failure on their part to comply with these requirements. But the Court jealously guarded the rights of the defendants in so charging and repeatedly told the jury that it was for them to decide whether or not the defendants complied with the law as charged by it, and, if they did not comply therewith, whether or not that constituted negligence, and that even then the plaintiff could not recover unless such negligence was the proximate cause of the injury."

The matter of a new trial was within the discretion of his Honor and his refusal to grant it will not be disturbed.

All exceptions are overruled and judgment affirmed.

Blease, Stabler, and Carter, JJ., concur. Cothran, J., dissents.

In Supreme Court of South Carolina

Dissenting Opinion

Cothran, J. (dissenting):

I think that the motion of the defendants for a directed verdict should have been granted; and at the least, that serious errors in the charge of the presiding Judge require the reversal of the judgment, and the ordering of a new trial. I therefore, respectfully, dissent from the affirmance of the judgment, indicated in the opinion of the Chief Justice, for the reasons which follow.

The action is by the administratrix of William A. Driggers, deceased, for damages resulting from the wrongful death of the intestate, a brakeman employed upon a switching train by the defendant railroad company, due as alleged to the negligence of the defendants in certain specified particulars.

The case was tried before his honor Judge DeVore, November Term 1925, resulting in a jury verdict of $25,000 in favor of the plaintiff.

The defendants have appealed upon numerous exceptions, assigning error in the refusal of their motions for a nonsuit and a directed verdict; in the charge of the presiding Judge; in his refusal to allow certain requests to charge; and in other particulars.

The deceased brakeman was killed by collision with the engine of a passenger train, passing on the south-bound main line, as he jumped from a switch engine entering the north-bound main line from a spur track, pulling a string of 12 or 13 cars.

It is extremely important, in my opinion, to have a clear conception of the locus of the unfortunate occurrence, which [fol. 122] resulted in the death of the brakeman; this I will endeavor to present.

At the point of the accident about 3 miles north of Charleston, the double tracks of the Coast Line and Southern railroads are parallel and quite near each other; they run practically due north and south, and for a distance of 2,000 feet toward the north, are perfectly straight, with no intervening obstructions to the view; the double track of the South-

ern lies to the west of that of the Coast Line. (The Southern Railway Company is not involved in this controversy and no further reference need be made to it.) The eastern line of the double track of the Coast Line is used and known as the north-bound main line; the western, as the south-bound.

To one standing south of the point of accident, between the north-bound and the south-bound main lines, facing the north, with his back toward the City of Charleston, the situation is this: upon his right is the north-bound main line, and upon his left, the south-bound; these lines measuring from the center of each, are 12 feet apart; leading from the north-bound main line, from a switch controlled by a lever on the east side of that line, in a northeasterly course and on a curve to the right, is a spur-track, crossing Meeting Street Road, (which is parallel with the railroad), and running to a Coal Yard, known as the "Etiwan Lead track".

Meeting Street Road, where the Etiwan Lead track crosses it, is, following the curve of that track, some 200 feet from the switch at the north-bound main line; between those points there were, at the time of the accident, at a point about half-way, a bill-board and some shrubbery, which obstructed the view by one at any point between the crossing and the half-way point, of a train approaching the switch from the north; but between the half-way point and the switch, a distance of about 100 feet, there was nothing to obstruct the view, toward the north, for a distance of nearly three-quarters of a mile, the track as stated being straight.

On the day in question, one McDonald, Yard Master of the Coast Line, (who is commonly spoken of in the record as "conductor"), with an engine and no cars attached, left the Charleston Yard for the purpose of transferring certain cars which were standing on the Etiwan Lead track, to the Seaboard Railway, at a connection point some distance north of the point of accident. His crew consisted of himself, one Yarborough, engineer, (since deceased), a fireman and the plaintiff's intestate, Driggers, brakeman. The "light" engine, (that is an engine with no cars attached), was running backward. When it reached the switch leading into the Etiwan Lead track, into which it was proposed to enter for the cars to be transferred, the conductor stopped

the engine, alighted and turned the switch, standing on the east side of the north-bound main line. The engine was then backed into the Etiwan Lead track to bring out the 12 or 13 cars which were to be transferred.

It appears that the conductor did not accompany Yarborough and Driggers into the Etiwan Lead track, but after turning the switch, and leaving it open, sent them on to do the work; he then crossed the double tracks of both railroads, towards the west, and took a position beyond the Southern's double track and near it, "to look for a train" that might be coming from the South on the north-bound main line. Driggers, on the Etiwan Lead track, was in his view, for he states that he saw him shifting the cars to be transferred, flagging the Meeting Street Road crossing, and mounting the footboard on the front of the switch-engine.

After Driggers had "cut out" a car in the string of cars on the Etiwan Lead track, coupled up to the cars to be transferred, flagged the crossing and mounted the foot-board of the engine, which then was moving front-foremost, pulling [fol. 123] the cars, the switching-train proceeded toward the switch at the north-bound main line. (Not the south-bound, as stated in paragraph 3 of the Complaint).

The contemplated train movement of the switching-train, was to enter again the north-bound main line, by the switch which the conductor had left open, pass south of the switch until the last car attached to the switch engine had passed the switch, stop, turn the switch to the north-bound main line, and shove the train of cars up that line to the S. A. L. Ry. connection, some distance north of the switch.

Driggers was riding upon the foot-board in front of the engine, which was in front of the string of cars; to retain that position until the last car had passed the switch and the engine had stopped, meant a walk back the distance of 12 or 13 car-lengths, to the switch that had to be turned again. Evidently to avoid this exercise, as the engine was about to enter the north-bound main line at the switch, Driggers was in the act of alighting from it on the right hand side—the switch was on the left—between the two main lines. The conductor, who was at the position assumed by him "to look for a train," called as a witness for the plaintiff, testified:

"I heard 79, (the train that struck the brakeman), blow at the Riverside Iron Works, and I wanted to be sure he saw 79. I wanted to give him a signal, and I pointed at the train; he was looking at me; I tried to call his attention to the train * * * I pointed at the train, told him to stay on the foot-board * * * That same signal would mean we were going to shove to the Seaboard Air Line R. R. * * * 79 was coming down the southbound track; as he stepped off right at this place he stepped into 79 there * * * As he stepped off the foot-board, I could see an object dangling in the driving-wheel of the engine * * * he swung into it, the pilot sill of the engine."

As he jumped he ran into the pilot beam of the passenger engine, which is back of the pilot (cow-catcher), was caught by the driving-wheel and horribly mangled.

In reference to the matter of Driggers' opportunity to observe the approach of the south-bound train that struck him, the same witness for the plaintiff, McDonald, testified that after Driggers had passed a point halfway between the Meeting Street Road crossing and the switch, he would have been clear of the bill-board and shrubbery and could have seen a train coming down on the south-bound main line a good deal further up than where the camera for the photograph was placed, 1,000 feet from the switch. This photograph shows that men standing on the Etiwan Lead track, 270 feet from the switch, can be seen from where the camera was placed. The witness (McDonald) testified that if the men shown on the photograph, had been standing further up the Etiwan Lead track, they could have been seen, and of course could have seen a train where the camera was placed. From the position occupied by McDonald, he saw the coming train three-quarters of a mile away.

I do not suppose that in the thousands of railroad accidents, a parallel can be found to the extra-ordinary circumstances which attended the death of the unfortunate brakeman in this case.

The circumstances mainly relied upon to attribute his [fol. 124] death to the negligence of the railroad company, cluster around the operation of the passenger train by the engineer, his conduct in that regard. It is alleged that he

was running his train at an excessive and dangerous rate of speed; that he failed to keep a lookout; that he failed to give a signal, a warning of the approach of his train, in view of the prevalence of the custom of switching cars at that point.

The charges against the company are that it failed to furnish the intestate with a safe place to work; in which is included its failure to provide sufficient space between the main lines, (north-bound and south-bound), to enable the employees to safely board and alight from trains in the performance of their duties; in permitting the right of way of the Etiwan Lead track, to be obstructed and screened by bill-boards and shrubbery.

I

First as to the Charges of Misconduct on the Part of the Engineer

The charges should not be entertained unless the evidence at least tends to show, that there was a reasonable ground for him to apprehend danger to a brakeman at that point, under the circumstances.

The plat offered in evidence by the plaintiff, shows that about 10 feet south of the switch for the Etiwan track, there is a switch for a cross-over track from the north-bound main line to the south-bound; but for the intervening 10 feet of north-bound main line track, between the switches, it is a continuation of the Etiwan track.

When the switch for the Etiwan track is turned, a red signal is displayed at a tower south of the switch, which warns a train from approaching the switch on the north-bound main line; and when the other switch, connecting the cross-over track with the south-bound main line is turned, a similar signal is displayed at a tower north of that switch, for south-bound main line trains.

Upon this occasion the switch connecting the cross-over track with the south-bound main line was not turned; in fact the cross-over track was not needed in the train movement then in progress; consequently no signal was displayed for south-bound trains; the engineer had of right, a clear track.

So far he was unquestionably within his rights. The red signal for the north-bound main line, was away south of the switch: it was not visible to him; and if it had been it would not have applied to him; he would have been chargeable with notice that the north-bound main line was in use, which of course would have no effect upon his use of the south-bound main line, upon which he had a clear track.

But if it can be said that the Etiwan track, in connection with the north-bound main line, was constantly being used as a switching ground, to such an extent as to charge him with notice that some brakeman would likely be at that locality, in reason he could not have suspected that in the discharge of his switching duties a brakeman would alight between the two main lines, on the west side of the north-bound main line, when the switch that he was expected to turn was 10 feet away on the east side.

The engineer testified that some distance from the switch he saw the switch-train coming out of the Etiwan track "for the north-bound track." He had the right to assume, in the absence of a red signal against his use of the south-bound line, that the activities of the switching-train would be confined to the north-bound main line. As a conceded {fol. 125} fact, the train movement of the switching-train, as contemplated, was to be confined to that line.

Is it just to charge him with the prescience, that a brakeman upon the foot-board of a switch-engine, whose position was unknown to him, would make use of the south-bound main line, or of the space between the two lines, in the discharge of a duty which called him upon the other side of the line, and run into his train? I do not think so. Would the engineer under these circumstances be in the slightest danger of a conviction of manslaughter? If his negligence was sufficient to impose a pecuniary liability upon the railroad company, he could not escape from such criminal liability.

Upon the question of the alleged excessive and dangerous rate of speed, I do not think there is a particle of evidence. The point of the accident is not shown to have been within the Charleston Yard, and if it was, no rule has been admitted in evidence (as the Circuit Judge held), fixing the rate of speed therein. It is shown by uncontradicted evidence that the engineer had the right, in this locality, to run 40 to 50 miles an hour.

But if it had been shown that the engineer was exceeding the speed limit, it has not been shown that it was the proximate cause of the collision.

The question appears to be concluded by the case of Patterson v. R. Co., 115 S. C. 390, where this appears in the opinion:

"Plaintiff testified that No. 48 came into the yard at a speed of 30 to 35 miles an hour, in violation of the rule and City ordinance referred to in the complaint. But he said that the engine and tender of No. 48 has passed the junction of the side track with the main line, so that the engine collided with the first or second car in that train."

Referring to the question of proximate cause, the Court said:

"Limiting the fourth ground, as suggested, to the speed of No. 48, we concur in the view that it was not the proximate cause of the injury, because that train did not run into plaintiff's engine, but his engine ran into the train after its engine (of No. 48) had passed the junction of the switch with the main line. The speed and position of No. 48 was therefore only a remote cause of the injury."

II

Next as to the Charge of Misconduct on the Part of the Company

The gravamen of this charge is that the Company did not provide a safe place for the brakeman to perform the service required of him. In that blanket charge there are specifications:

a. That the space between the two main lines was insufficient to enable the employees to safely board and alight from the trains;

b. In permitting the view from the Etiwan track, for trains coming from the north, to be obstructed by billboards and shrubbery, upon the right of way between that track and the main line.

(a)

As to insufficient space: The authorities universally hold that the place as to which complaint is made must have been a place provided by the master for the service. It cannot be assumed simply from the fact that a servant was injured at a particular place, which the result shows to have [fol. 126] been a place of danger, that that was the place provided by the master for him to work; particularly in view of the positive evidence in the case that there were other places perfectly safe.

In Broadway Co. v. Rander, (Ky.) 119 S. W., 198, it is said:

"The duty of the master to furnish a reasonably safe place applies only to the place which the employe is required to use for the purpose of performing his duty."

In Harper v. R. Co., (Ky.) 115 S. W., 198, it is said:

"But the duty of furnishing reasonably safe appliances and reasonably safe places and premises is confined to the appliances and places and premises with which the servant is required to work, or in which his duties require him to be."

In Smith v. Trimble, (Ky.) 64 S. W., 615, the Court said:

"And when appellant, without invitation or knowledge of the owner, went into or upon other parts of the premises not necessary for the performance of his labor, he assumed all the risks of doing so. He was neither required, expected nor allowed to be at the place where he was injured, and consequently appellee was under no duty to him to provide there a place of safety."

In Albert v. McKay, (Cal.) 163 Pac. 626, the Court said:

"The negligence charged in the first count is the failure to comply with the employer's duty to furnish his employe with a reasonably safe place to work. The duty is limited to 'the premises where the employe is required, for the purpose of his employment to be.'"

In Harris v. Det, (N. J.) 70 At. 155, the Court said:

"A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it."

"The duty of a master to furnish a safe and suitable place for his servants to do their work in extends only to such portions of the premises as he has prepared and designed for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it."

Morrison v. Co., (N. H.) 85 Am. St. 634.

"A master's duty to furnish his servant with a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing their work, and to such parts as he knows or ought to know they are accustomed to using while doing it."

Triangle Co. v. Acree, (Ark.) 166 S. W. 958.

"A master's duty in respect to furnishing his servant with a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing their work, and to such parts as he knows or ought to know they are accustomed to using while doing it." [fol. 127] LaBatt, (1st Ed.) sec. 1558b.

"The employer is not an insurer of the employee's safety. He is liable for the consequences of his negligence but not of the dangers of the employment."

39 C. J. 260.

It appears to me therefore that the railroad company assumed no obligation whatever to the deceased in the matter of his voluntary effort in attempting to alight between the main lines. The foundation of the plaintiff's claim is that because Driggers selected the place to alight, the railroad company must be assumed also to have selected it and required him to work there.

The fact, if it be a fact, that the deceased may not properly be charged with negligence in not crossing over to the

left foot-board, where he could have alighted upon the side where the switch was, does not by any means establish the fact that the company provided or expected him to use the space between the lines for alighting; this is the gist of negligence in this respect.

(b)

As to the bill-boards and shrubbery: Giving the plaintiff the benefit of the shortest distance testified to, between the Meeting Street Road crossing and the connecting switch at the north-bound main line, 200 feet, the evidence is overwhelming from the plaintiff's witnesses, that the obstruction of vision did not extend further than half-way to the switch, and that for the remainder of the distance, 100 feet, a person at any point on the Etiwan track could have had an unobstructed vision of the south-bound main line for a distance of nearly three-quarters of a mile.

The plaintiff offered in evidence, and it is a part of the record for appeal, a photograph taken from a point on the south-bound main line, 1,000 feet from the switch in question. In that photograph three men appear standing on the Etiwan track 270 feet from the switch, who can be seen, of course if they are in the picture, from the point where the camera rested. If they can be seen at that point by the eye of the camera, it is indisputable that they could see an engine as it reached the point where the camera rested.

III

I have discussed the case from the standpoint of the negligence of the engineer and of the company; I shall discuss it now from the standpoint of the brakeman's negligence. Whether his conduct may be considered negligent or not, I think that the sole proximate cause of the fatal occurrence was the act of the brakeman.

The rule in the Federal Court, the final arbiter in cases involving the Employers' Liability Act, is thus stated in the case of Pheasant v. R. Co. (C. C. A.), 285 Fed., 342.

"While such negligence is contributory, and evidence of it is admitted under the Federal Employers' Liability Act ordinarily in diminution of damages, it is nevertheless a bar to recovery when it is clear that it was the proximate cause

of the injury, or, stating it perhaps more accurately, when it appears that the decedent's death was caused solely by his own carelessness." Citing a number of cases including Linkous v. R. Co., 242 U. S., 630.

It appears beyond dispute that the brakeman flagged the [fol. 128] Meeting Street Road crossing and mounted the right hand front foot-board of the switch engine which was then moving forward toward the switch—the most favorable position that he could have selected for observation. After he had passed the midway point between the road-crossing and the switch, for a distance of at least 100 feet he had a wholly unobstructed view of the south-bound main line as straight as a gun-barrel, for not less than 1,000 feet; and the evidence for the plaintiff by the photographer and the conductor of the switch-train is to the effect that the point where the camera was placed, 1,000 feet from the switch, could have been seen by a man standing on the Etiwan track 270 feet from the switch. The evidence of the conductor is that standing 15 or 20 feet across the two double tracks, on the west, he could see the coming passenger train for three-quarters of a mile. He heard the whistle of the train away up north of the switch at the Riverside Iron Works.

It seems impossible to conclude otherwise than that Driggers could have both seen and heard the coming train if he had exercised the least degree of care to ascertain whether it was coming or not.

Most probably he concluded that as his work did not naturally call him to the south-bound main line, he had nothing to fear from a train upon that track; if so was the engineer not entitled to draw the same conclusion? As a matter of fact his use of the south-bound main line was purely accidental, caused doubtless by the momentum of his own body as he alighted from the moving switch engine. The conductor significantly testified: "He did not step on the south-bound track; he stepped between the tracks and turned; he had to get his balance." Evidently the switch engine was moving more rapidly than he calculated, and after he alighted between the tracks his momentum carried him into the engine on the south-bound track; an accident pure and simple. Could the engineer be charged with the probability of such an improbable occurrence?

We may never know whether the brakeman saw the coming train or not; it is very sure that his duty did not call him into that death-trap; he would have been perfectly safe upon the foot-board if he had retained his position there or had waited until the train passed; it is not improbable that a stumble carried him into the engine; as a matter of fact he was not charged with the duty of turning switches; the conductor testified that it was entirely optional with him. The conductor had turned the switch for the entry into the Etiwan track, and was only 15 or 20 feet from the switch when the train entered the north-bound main line; there was no necessity therefore for the brakeman to take the risk he ran.

IV

But assuming that the accident was not due solely to the conduct of the brakeman, and that it could only be urged by the defendants as contributory negligence, in diminution of the damages, the risk that he ran was either a risk ordinarily incident to his employment or an extra-ordinary risk due to the negligence of the defendants.

If an ordinary risk, he must be held to have assumed it, under the principles announced in Chesapeake &c R. Co. v. Nixon, 271 U. S., 218:

"If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees." (Citing authorities.)

I think that the truth of the matter is that he knew of the train's approach, (or certainly, what is the same thing [fol. 129] in law, he should have known of it), and anticipated no danger from it on the south-bound main line; that what happened was a contingency which he could not reasonably have anticipated, an accident pure and simple, with the anticipation of which the engineer of the passenger train was not more chargeable than the brakeman was.

If the risk was an extraordinary one, due to the negligence of the defendants, the brakeman must be held alike

to have assumed it with the knowledge he had or should by the exercise of ordinary care have had, of the alleged negligence of the defendants and of the danger thereby created in the attempt which he made.

V

I think that the presiding Judge erred in refusing the motion of the defendant Railway Company to strike from the complaint subdivision "N" of paragraph 4.

The presence of buildings or other obstructions to vision alongside of a railroad track, upon the land of others, may have a bearing upon the duty of a railroad company to exercise care commensurate with that situation, and upon the opposite party to the controversy as well, but I know of no law which forbids a man from putting up such structures upon his own land as he pleases, or which requires a railroad company to have them removed for the protection of those with whom it may come in contact.

VI

Under the undisputed facts of the case the defendant Railway Company was entitled to have its first request to charge presented to the jury.

VII

The fifth request to charge clearly and correctly declared the law of assumption of risk and should not have been refused.

VIII

The 16th, 18th and 22d exceptions assign error in charging that the delicts therein referred to constitute violations of law. They may have been evidence of negligence without being violations of law. The vice in the charge was classing them with specific statutory regulations, the violations of which constitutes negligence per se.

IX

The 25th exception points out a palpable error. It is so well settled as to require no authorities, that assumption

of risk is of two kinds: (1), the assumption of such risks, not due to any negligence on the part of the master, as are ordinarily incident to the work in which the servant may be engaged; and (2), extraordinary risks, risks due to some failure of duty on the part of the master, (negligence), which are known or should be by the exercise of ordinary care, to the servant, and the dangers of which are appreciated by him. In either case the servant is held to have assumed the risk. The charge of the presiding Judge specifically limited the defense to the first class.

There are other errors in the conduct of the trial of which "the time would fail me to tell," but these suffice.

Note.—Report Complaint, Answer, Motion for directed verdict, Requests to charge, Charge and Exceptions.

[fol. 130] In Supreme Court of South Carolina

[Title omitted]

Petition for Stay

To the Honorable Eugene S. Blease, Associate Justice of the Supreme Court of South Carolina:

The petition of the defendants respectfully shows:

1. That the final judgment of the Supreme Court in South Carolina in the above stated cause against your petitioners was rendered on 28th March, 1928, by an opinion affirming the judgment of the Court below.

2. That the said final judgment is subject to review by the Supreme Court of the United States on Writ of Certiorari, upon the grounds that the said final judgment denies to your petitioners rights, privileges and immunities granted to them under the Constitution of the United States and deprives them of their property without due process of law, and denies to them the equal protection of the laws under the Constitution of the State of South Carolina and of the United States.

3. Your petitioners further present that the cause of action herein arises solely under the Act of Congress and

Acts amendatory thereto commonly known as the Federal Employers' Liability Act, under which all questions of liability are finally determinable only by the Supreme Court of the United States, which has ultimate jurisdiction of [fol. 131] questions of law and facts arising in such a case. Chicago, M. & St. P. R. R. Co. vs. Coogan, 271 U. S. 472, 70 L. Ed. 1041.

4. That your petitioners, being the parties aggrieved by the aforesaid judgment, desire to apply for a Writ of Certiorari from the Supreme Court of the United States, and in order to make such application and obtain such Writ it is necessary that the execution and enforcement of such judgment be stayed for a reasonable time.

5. That your petitioners stand ready to give such security for the protection of the plaintiff in the above stated cause as may be necessary or proper.

Wherefore your petitioners pray that the execution and enforcement of the aforesaid judgment be stayed pursuant to the Acts of Congress in such case made and provided, and that your petitioners be allotted a period of ninety days in which to apply for a Writ of Certiorari from the Supreme Court of the United States.

Thos. W. Davis, Douglas McKay, Hyde, Mann & Figg, Attorneys for Atlantic Coast Line Railroad Company, and M. H. Brandt, Petitioners.

[fol. 132] In Supreme Court of South Carolina

[Title omitted]

Order Staying Judgment—April 6, 1928

The defendant Atlantic Coast Line Railroad Company, and M. H. Brandt, having made application for stay of execution and enforcement of judgment in the above entitled cause for a reasonable time to enable them to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States,

It is ordered that the said defendants have ninety days from the date hereof within which to apply for a writ of Certiorari from the Supreme Court of the United States and that the remittitur and execution and enforcement of judgment herein be stayed for said time and thereafter until that Court finally adjudicates thereon, provided the defendants or either of them shall file a bond with good and sufficient surety in the penal sum of One Thousand and no/100 Dollars, ($1,000.00) within ten days from the date hereof, conditioned to indemnity the plaintiff above named against all damages and costs that She may sustain by reason of the stay if the defendants fail to make application for such Writ within the period allotted therefor, or fail to obtain an order granting their application, or fail to make good their plea in the Supreme Court of the United States.

It is further ordered that a copy of this order be served without delay on the plaintiff herein or one of her attorneys of record.

[fol. 133] It is further ordered that this order be filed in the office of the Clerk of the Supreme Court of South Carolina.

Eugene S. Blease, Associate Justice of the Supreme Court of South Carolina.

[fols. 134 & 135] Bond on stay for $1,000, approved; omitted in printing.

[fol. 136] In Supreme Court of South Carolina

[Title omitted]

Præcipe for Transcript of Record—Filed May 16, 1928

To the Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of the State of South Carolina;

All journal entries contained in the records and proceedings of the Supreme Court of the State of South Carolina relating to said cause;

The final judgment and decision of the Supreme Court of the State of South Carolina;

Your certificate to the record that it is a complete record in said cause.

Dated this 14th day of May, 1928.

Thos. W. Davis, Douglas McKay, Hyde, Mann & Figg, Atorneys for Atlantic Coast Line Railroad Co., and M. H. Brandt, Appellant.

[File endorsement omitted.]

[fol. 137] Certificate of I. B. Westbrook, Clerk of Supreme Court of South Carolina, to foregoing transcript omitted in printing.

Endorsed on cover: File No. —. South Carolina Supreme Court. Term No. —. Atlantic Coast Line Railroad Company, petitioner, vs. Marcella Driggers, as administratrix of William A. Driggers, deceased. Petition for writ of certiorari and exhibit thereto. Filed —— ——, 1928. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 15, 1928

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX TO PETITION FOR WRIT OF CERTIORARI

Petition for writ of certiorari: Page

1. Matters involved and reasons relied on by petitioner for allowance of writ 2

2. Specific grounds of negligence alleged and erroneous instructions given 10

3. Summary of reasons relied upon for allowance of writ .. 14

Prayer for writ 15

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

v.

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner, Atlantic Coast Line Railroad Company, respectfully asks this Court to review on *writ of certiorari* a judgment of the Supreme Court of the State of South Carolina *in the case of Marcella Driggers, as Administratrix of the estate of Willian A. Driggers, deceased, versus Atlantic Coast Line Railroad Company*, defendant and appellant below, ren-

1w

dered on the 28th day of March, 1928 (R., 113). Under the practice prevailing on appeal in South Carolina, no judgment separate from the opinion of the supreme court is rendered, and the opinion of the supreme court is the final judgment. (See Clerk's Certificate, R., 139.)

The matters involved and the reasons relied on by petitioner for the allowance of the writ are:

I.

This action, which was tried and decided under the Federal Employers' Liability Act (R., 1, 90), was brought to recover for alleged negligent death of plaintiff's intestate, William A. Driggers, employed at Charleston, South Carolina, as a brakeman in a switching crew, *who was killed by stepping from the front running board of his own engine, on a clear, sunshiny day, directly into the pilot beam of an approaching engine on the adjacent main line, at a place where he had a clear view of the approaching engine for two thousand feet or more for a distance of one hundred feet or more, measuring perpendicularly, before reaching such main line.* Intestate was a member of a switch crew, with petitioner's engine No. 164, engaged in switching cars to various points. At the time of the accident the crew was making a delivery of cars to the Seaboard Air Line Railway from the track referred to in the testimony as the Etiwan Lead track (R., 25, 28, 30). The *locus in quo* of the accident is made clear by reference to the "sketch" or plan of the tracks in the record (R., 50). The track from which intestate's

engine was entering the northbound main line is that shown on the sketch or plan between Ashepoo Lane and Planters' Lane, as "track to coal yard"—east of one designated "track to Fertilizer Mill," running in a northerly direction from A. C. L. northbound track across Meeting Street road to the coal yard. This spur track is generally designated in the testimony as the "Etiwan Lead." The track to the left of the northbound track, designated on the plat as "A. C. L. Rwy. southbound track," is the main line track on which the passenger train No. 79, which struck intestate, was running in a southerly direction. The two tracks west of that track are Southern Railway tracks and have no connection with the accident. The northbound and southbound main line tracks are twelve feet apart, measured from center to center (R., 27); railroad tracks are standard and laid out with regularity, being usually a standard distance between double tracks (R., 27). The scene is also graphically shown by the second photograph in the record (R., 50), bearing the legend "Men are about 270 feet on the curve from switch, camera about 1,000 feet from switch, camera pointed south." The "men" designated in this picture are on this Etiwan Lead, about 270 feet from the "switch" indicated, which leads to the northbound main line, at which switch the accident occurred, and the track in the middle of the picture, to the right of the northbound main line, is the southbound main line on which the passenger train with which intestate collided in stepping off the switch engine was running. The two tracks to the right of this

picture are Southern Railway tracks. Intestate's switch engine and crew had come out of Charleston yard with the engine to make this movement and, as they approached Etiwan Lead, the conductor, McDonald (also called yard foreman), directed intestate to cut a car in that track, and the conductor threw the switch into the Etiwan Lead, and the switch engine and cars went into that track from the northbound main line (R., 28, 29). After delivering the car and picking up some cars in this spur, the switch engine moved back *toward* the main line across Meeting Street Road, which crossing intestate flagged for the engine (R., 30), and then got on right-hand side of the front footboard of the engine, as it approached the northbound main line (R., 30, 28), at a speed of about six miles an hour, moving on an upgrade (R., 36). When the switch engine reached the northbound main line, intestate stepped or swung off between the north and southbound main tracks and stepped directly into and against the pilot of the engine of passenger train No. 79, going south on the southbound main track (R., 36, 30). Plaintiff's witness, the conductor, testified that "As he (intestate) stepped off right at this place he stepped into 79 there" (R., 30). "He swung into it, the pilot sill of the engine," as he stepped off (R., 36). Apparently, the momentum from stepping off his engine carried intestate into and against the pilot of the passing train. "He stepped between the tracks and turned; he had to get his balance" (R., 31, 38). Before stepping off intestate did not look back toward the north and the approaching main line train, but looked

south (R., 38). After he had opened the Etiwan Lead switch and left it open, the conductor walked fifteen or twenty feet to the west of the main line track "to look for a train" (R., 28). He had heard No. 79 blow at the River Side Iron Works, which is somewhat north of the place of the accident, and wanted to be sure intestate saw that train (R., 28). As he approached the main line on the front of the switch engine intestate was looking at the conductor, and the latter tried to call his attention to the approaching train by pointing at it and warning him to stay on the footboard, but intestate may have assumed that the conductor's motions meant that they were going to back up the main track into the Seaboard Air Line track, which was in fact what the crew intended to do (R., 29, 37). At the time he stepped off the front of the switch engine it was not his duty to throw any switches (R., 38, 39), and the conductor had left the switch open for the main line (R., 28); intestate "was supposed to be on the car; it was optional for him to get off and throw the switch" (R., 39). He did not get off to throw any switch on the right side of the track, on which side of the engine he was (R., 39). The switch stand of the Etiwan Lead was *on the left-hand side* of the northbound track (R. plat, page 50), and intestate could have gotten off on the left-hand side of the switch engine by climbing over the drawhead of the engine, as the footboard on which he was standing runs from the right to the left side of the engine; there is a short footboard on each side, with the drawhead in between (R., 39).

The distance from Meeting Street Road to the northbound main track is about six car lengths, or two hun-

dred and forty or two hundred and fifty feet (R., 35). While the view toward the north is obstructed by billboards and shrubbery for about half the distance from Meeting Street Road toward the main line (R., 33-35), when the switch engine had reached a point half way, or *about one hundred and twenty to one hundred and twenty-five feet*, measuring perpendicularly, from the main line tracks, a train coming on the southbound main line could be seen fully *two thousand feet or more* to the north (R., 35, 36, 75, 60, 76). The towerman at Southern Connection Tower, which is about two thousand feet, or one-fourth of a mile, north of Etiwan Lead, the place of the accident, saw the train which struck intestate stop that day (R., 54). The first photograph in the record, just before the plat (R., 50), was taken with a camera about one thousand feet north of the place of the accident and pointed south (the direction No. 79 was running) to the switch, and the "men" indicated in the picture are about two hundred and seventy feet from the switch point, and standing on the curve of the Etiwan Lead, and are plainly in view. The photographer taking this picture testified for plaintiff that these men could see him when he took the picture (R., 16); he could see them (R., 15), and they told him they could see him, which is necessarily true (R., 16), although witness Parnell, one of the men in the picture and brother-in-law to the intestate, testified he could not see the photographer (R., 21, 22, 23), which was obviously untrue, as shown by the second picture, between pages 50 and 51 of the record; also that these men could have been seen at a greater distance than

the 1,000 feet at which he placed his camera (R., 15). These men, who were standing on the Etiwan Lead 270 feet from the switch, are at a point about half way from Meeting Street Road to the northbound main line (R., 30). A man standing on the foot board of the switch engine, where intestate was standing as it came out of Etiwan Lead, could have seen a train coming on the southbound main track from the point where the men are standing on the switch track a considerable distance north of where the camera was placed to take this picture (R., 35), and could have seen such train just as well a little nearer Meeting Street Road (R., 36), that is, a little farther from the point of the accident.

The undisputed evidence shows that a number of signals by bell and whistle were given by No. 79 shortly before intestate was struck. The conductor heard it blow the whistle before it reached the Etiwan Lead, and wanted to be sure that intestate saw the train and tried to give him a hand signal of its approach (R., 28). No. 79 blew four long blows just opposite or after passing Southern Connection Tower (R., 54), which is about 2,000 feet or one-fourth of a mile north of Etiwan Lead (R., 54). The conductor testified for plaintiff (R., 29) that the engine did not blow "right on to him" (meaning intestate), but the undisputed evidence of the fireman of No. 79 is that at the time of the accident "the engineer had just finished blowing the whistle for the block signal for Magnolia Crossing" (R., 77, 63). The automatic bell ringer had been ringing since leaving Ashley Junction (R., 63, 77), and

rang continuously until the accident happened R., 77). The whistle was blown almost continuously along there (R., 77). The engineer put on the emergency brakes as soon as the fireman told him they had hit a man (R., 61, 62). Intestate stepped into the pilot on the fireman's side and, on account of the height of the boiler, the engineer could not see a man stepping in front of his engine on the left side less than fifteen or twenty feet in front of the engine, if the head was out of the window, and could not see a man stepping on the track five feet in front (R., 62). The fireman did not see intestate until he was in the act of stepping off the foot board, when he hallood to the engineer, who applied his brakes immediately (R., 77). Plaintiff's witness testified that train No. 79 should have been able to stop within a train's length and a half (R., 29). The engineer was keeping a proper lookout just before the accident (R., 68).

The conductor testified that the speed of the train was at least fifty miles an hour, but could not tell whether it slackened speed just before the accident (R., 40), as the train was coming directly toward him (R., 40). The conductor's estimate of the speed was the maximum given by any witness, and when he gave that estimate he apparently thought that the speed limit, under the company's rules at that point, was forty miles an hour instead of fifty, as it was (R., 41, 42, 48, 49). Other trainmen and employees, including the engineer, placed the speed at thirty-five or forty miles an hour (R., 61, 54, 72, 73, 76). In fact, the speed limit for train No. 79, a local passenger train, at the point of

the accident was fifty miles an hour (R., 68, 48, 49, 50). "First-class trains," such as this passenger train, had a speed limit of fifty miles an hour, except at certain points where "semaphore interlocking signals are in service," as listed in the rules in evidence (R., 49, 50). The nearest one of these points to the place of the accident is (R., 49) "Southern Connection (Main Line Trains)," where the limit for passenger trains is forty miles an hour, but Etiwan Lead Switch, where the accident occurred, is about 2,000 feet south of Southern Connection, and between that and Magnolia Avenue Crossing Tower (R., 54, 52). The term "Southern Connection," as used in these regulations, means only the signal tower itself (R., 56), which fact is also indicated by the manner in which the semaphore signal points are listed in the speed limitation instructions (R., 48, 49). The undisputed evidence, therefore, is that the speed limit at Etiwan Lead was fifty miles an hour, which was not shown to have been violated. Train No. 79 was runnin[illegible] few minutes late (R., 32, 48).

There is a passover switch a short distance below the place of the accident, on which switch trains crossed over from the northbound main track to the southbound main track (R., 37, 38, and plat 50), and if the switch leading to this and the southbound main track had been thrown, this would have been a signal to traffic on the southbound main track (R., 37, 38), but the crew was doing no work on the southbound main track, but

were going to back up the northbound main track (R., 37), which intestate knew (R., 31).

Intestate had been working for the railroad about five years, and had been working with the yard conductor, with whom he was working when killed, for six or seven months (R., 25). They use the Etiwan Lead switch, where the accident occurred, every day, and sometimes more than once a day (R., 40). Intestate's brother-in-law, who testified for plaintiff, had seen him with the engine, and at that track once or twice (R., 22).

There was verdict and judgment for plaintiff for twenty-five thousand ($25,000) dollars (R., 1, 13, 16), which judgment the State supreme court affirmed on March 28, 1928, as appears from its opinion (R., 113), Cothran, J., dissenting.

II.

Of the specific grounds of negligence alleged in the complaint (R., 3 to 5), the trial judge submitted to the jury the following: (*b*) Negligence in operating the train at a high and dangerous rate of speed and at a speed in excess of that allowed by rules and regulations of defendant; (*c*) In operating the train at such an excessive rate of speed as to prevent intestate from getting out of its way; (*d*) In failing to give timely or sufficient warning or signal; (*e*) In failing to cause the train to slacken speed within yard limits while passing place where employees were accustomed to travel; (*g*) In failing to keep lookout; (*h*) In failing to take precaution for the safety of employees where switching was known to be done all day; (*i*) In failing to furnish a

safe place of work and provide sufficient space between the tracks to enable employees to safely alight from trains; (*m*) In causing and permitting right of way between Etiwan Lead and the main line to be obstructed by bill boards, bushes, etc.; (*n*) In failing to cause the land between the main track and the spur to be kept free from bill boards and shrubbery, to enable employees to see approaching southbound trains on main track. The court charged that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged" (R., 87).

The trial court gave the following instruction in submitting specification (*b*) of negligence alleged (R., 81 102):

> "The next specification is (*b*):
>
> "In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards."
>
> "Well, it would be a *violation of law* for a railroad company to operate its trains at a high and dangerous rate of speed, and in excess of that *allowed by law*, and it would be *a violation of law to operate in excess of the rate of speed allowed in the yard*. All that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence." (Italics ours.)

There is no evidence whatever that it was "in violation of law" to operate the train at a high and dangerous rate of speed at the point of the accident, or that there was any legal speed limit there, and no evidence that the train was operated in excess of any safety restriction. This also applies to the instruction next mentioned.

The trial judge gave the following instruction in submitting specification (*c*) of negligence (R., 82, 103):

> "The next specification is subdivision (*c*):
>
> "'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the said train, and so to avoid being run over by it.'
>
> "Well, if they did that, *that was a violation of law*, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that, and that was negligence and carelessness, and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence." Italics ours.)

The trial court also gave the following instruction on assumed risk (R., 90):

> "Now the ninth paragraph sets up assumption of risk, and the law in regard to that is this: whenever a master employs a servant,—and when I say master, I mean the Railroad Company, and when I say servant, I mean the deceased,—whenever a master employs a servant, the servant assumes all the risks ordinarily in-

cident to the work that he is employed to do. That is just as binding on the servant as a written contract. He assumes all ordinary risks. *He does not assume any extraordinary hazards or risks, just those risks connected with his work.* And if the death of the deceased was cause by an ordinary risk, he assumed that. If that was the cause of his death, he assumed that." (Italics ours.)

The trial judge refused to give the following charge requested by petitioner on the same subject (R., 79, 80, 92):

"5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily incident to his employment, or which arise in the progress of the work. Some employments are necessarily dangerous and fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an

> ordinarily prudent person under the circumstances would have observed and appreciated them. If, however, he does actually know and appreciates the danger or risk, or by the exercise of proper care and caution should have known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover."

The issue of assumed risk was raised by the pleadings (R., 11) and evidence, and the error in the foregoing charge and refusal to charge was preserved by petitioner's exceptions (R., 107, 108, 101, 102).

III.

Petitioner earnestly contends that the *writ of certiorari* should be granted to review and reverse the judgment of the State supreme court herein, because:

(1) There is no evidence whatever to show negligence proximately causing the injury in obstructing intestate's view of the approaching train, or in failing to give signals, or on any of the other grounds alleged and submitted; the undisputed evidence showing that intestate's death was caused solely by his own act or negligent omission (R., 97, 98).

(2) The undisputed evidence shows that the intestate assumed any risk of injury from stepping between the tracks at the time and place shown, the danger being obvious, and he having knowledge of all relevant circumstances (R., 99).

(3) Because the State court erred in sustaining instructions that it would be a violation of law to operate the train at a high and dangerous rate of speed and in excess of the speed allowed in the yard, there being no evidence whatever that the speed of the train was in violation of law or in excess of that allowed at the place of the accident. The court also charged (R., 87) that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged."

(4) The State court erred in giving an instruction on assumed risk, to the effect that the employee "does not assume any extraordinary hazards or risks, just those risks connected with his work," and in refusing a correct charge requested by petitioner on this subject (R., 107, 108, 101, 102).

Wherefore, because said decision and judgment of the State supreme court decided the foregoing Federal questions in a way not in accord with the decisions of this Court, your petitioner prays that a *writ of certiorari* be issued to the Supreme Court of the State of South Carolina, to the end that said cause may be reviewed and determined in this Court, as provided by law, and that upon such review the judgment of the Supreme Court of South Carolina be ordered to be reversed.

ATLANTIC COAST LINE RAILROAD COMPANY,

By THOS. W. DAVIS,

Attorney for Petitioner, Atlantic Coast Line Railroad Company.

INDEX TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

	Page
Brief in support of petition:	
Official report	1
Statement of grounds of jurisdiction	1
Statement of case	3
Argument and propositions:	
I. There is no evidence to show negligence as charged proximately causing intestate's death, but the undisputed evidence shows that his death was caused solely by his own act or omission	3
II. Under the evidence intestate assumed any risk of injury from stepping between the tracks, the danger being obvious and he having knowledge of all relevant circumstances	26
III. The court erred in sustaining instructions, without supporting evidence, that it would be a violation of law to operate the train at a high and dangerous rate of speed and in excess of the speed allowed in the yard	29
IV. The State court erred in sustaining an instruction that an employee does not assume any extraordinary hazards or risks, and in sustaining refusal of a correct charge requested	33
Conclusion	39

Table of Cases Cited.

Ackfertz vs. Humphreys, 145 U. S., 418	28
Baltimore and Ohio R. R. vs. Goodman, dec. October 31, 1927	8
Berry vs. Chase, 146 Fed., 625, 627 (Sixth Circuit, C. C. A.)	26
Boldt vs. Penna. R. Co., 245 U. S., 441, 445	28
Chesapeake & Ohio R. Co. vs. Nixon, 271 U. S., 218	2, 17
Chesapeake & O. R. Co. vs. De Atley, 241 U. S., 310, 316	36
Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 427	2, 4
Davis vs. Philadelphia & R. Ry. Co., 276 Fed., 187	18
Director General vs. Templin, 268 Fed., 483 (3d Circuit, C. C. A.)	13

Page

Fillippon vs. Albion Vein Slate Co., 250 U. S., 76..... 33, 39
Great Northern Ry. Co. vs. Wiles, 240 U. S., 444..... 23
Hathaway vs. East Tennessee, B. & G. R. R., 29 Fed., 489-490.. 26
Interstate Compress vs. Agnew, 276 Fed., 882, 887 (Eighth Circuit, C. C. A.)..... 26
Jacobs vs. So. Ry. Co., 241 U. S., 229..... 29
Patton vs. Texas & P. R. Co., 179 U. S., 658..... 3
Patterson vs. Director General, 115 S. C., 390, 396..... 21
Pheasant vs. Director General of Railroads, 285 Fed., 342 (3rd C. C. A.)..... 2, 16
Seaboard Air Line Ry. Co. vs. Koennecke, 239 U. S., 352..... 19
Southern Ry. vs. Gray, 241 U. S., 333..... 2, 21
St. Louis, San. F. Ry. Co. vs. Mills, 271 U. S., 344..... 2, 3, 32
Toledo, St. L. & W. R. Co. vs. Allen, dec. February 20, 1928 (72 L. Ed., 267, Adv. Sheets March 1, 1928)..... 2, 18, 24

STATUTES CITED.

Federal Employers' Liability Act of 1908, as amended..... 2
Judicial Code, Section 237, as amended by Act of Congress September 6, 1916, Chap. 448, Section 2, and Act of February 13, 1925, Chap. 229, Section 1..... 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

versus

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

BRIEF FOR PETITIONER.

Official Report.

The decision of the Supreme Court of South Carolina has not yet been officially reported.

It is found on page 113 of the record.

Statement of Grounds of Jurisdiction.

The date of the judgment sought to be reviewed herein is March 28, 1928.

This action was tried and decided by the State courts under the Federal Employers' Liability Act of 1908 (R., 1, 90, 91, and opinion of State supreme court, page 113 of record). Judgment was rendered for plaintiff for twenty-five thousand ($25,000) dollars (R., 1, 13), and petitioner's motion for a new trial was denied (R., 97), and petitioner appealed to the State supreme court. The judgment was affirmed by the South Carolina Supreme Court (R., 113). Justice Cothran dissented.

The jurisdiction of this Court is invoked under the Federal Employers' Liability Act of 1908, as amended, and under Judicial Code, Section 237, as amended by Act of Congress, September 6, 1916, chap. 448, Sec. 2, and Act of February 13, 1925, chap. 229, Sec. 1.

The cases believed to sustain the jurisdiction of this Court are:

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 427.

Southern Ry. vs. Gray, 241 U. S., 333.

St. Louis, San Francisco Ry. vs. Mills, 271 U. S., 344.

Pheasant vs. Director General of Railroads, 285 Fed., 342 (3rd C. C. A.).

Chesapeake & Ohio R. Co. vs. Nixon, 271 U. S., 218.

Toledo, St. L. & W. R. Co. vs. Allen, Dec. Feb. 20, 1928 (72 L. Ed., 267, Adv. Sheets March 1, 1928).

Statement of Case.

All of the relevant evidence, as well as the instructions claimed by petitioner to have been erroneously given or refused by the State court, are fully set out in the petition, and are fully stated and set out in the body of this brief insofar as necessary to a discussion of the several questions involved; repetition here will, therefore, be unnecessary.

Point I.

There is no evidence whatever to show negligence as charged proximately causing intestate's death, but the undisputed evidence shows that his death was caused solely by his own act or omission.

Numerous decisions of this Court established the rule that, in an action under the Federal Employers' Liability Act, the burden is on plaintiff to prove some definite act of negligence.

St. L., S. F. R. Co. vs. Mills, 271 U. S., 344.
Patton vs. Texas & P. R. Co., 179 U. S., 658.

> "The employer is liable for injury or death resulting in whole or in part from negligence specified in the act; and proof of which negligence is essential to recovery. *The kind or amount of evidence required to establish it* is not subject to the control of the several States. This Court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judg-

ment will be reversed." Citing cases. (Italics ours.)

Chicago, M. & St. P. R. Co. vs. Coogan, 271 U. S., 472, 474.

It is also held in the *Mills* case, *supra,* that the evidence must point to the essential fact which the jury is required to find, in order to sustain the verdict, and that it is reversible error to submit an issue of negligence to the jury where there is no evidence fairly tending to prove it without the necessity of conjecture.

Under these well established rules, not only is there no evidence whatever to prove negligence in the respects alleged, but the undisputed evidence in the record expressly negatives and disproves all of the allegations of negligence relied on. The grounds of alleged negligence apparently relied on by the State supreme court to fasten liability upon petitioner are thus stated in its opinion (R., 116):

> "On a track where his vision was obstructed by billboards, shrubbery and bushes, and the failure on the part of the engineer to slacken his speed, blow his whistle, keep a proper lookout or to take any precaution to keep his train under control at a place where he knew constant switching was going on, and his failure to take such precaution in the face of the signal he could have seen conductor MacDonald giving to plaintiff's intestate, were acts of negligence, and, certainly were questions to be submitted to a jury to determine whether or not they constituted negligence."

This statement appears to have been taken bodily from the respondent's brief below.

We will consider *seriatim* the grounds of negligence alleged and relied on and above enumerated by the State court. One of the principal grounds asserted is that intestate's view of the approaching train was obstructed by billboards and bushes. We contend that the question of obstruction of the employee's view is properly not involved in this case, because, under the undisputed facts, there was no obstruction whatever of intestate's view in any real or legal sense. The only obstruction to an employee's view at his place of work which would be material on the question of liability would be one which deprived him of a reasonable opportunity to see and avoid impending danger, and the undisputed evidence to which we now refer conclusively shows there was no such obstruction at the place of the accident. The plat and picture of the scene of the accident (R., 50) show that the spur track called Etiwan Lead in the testimony, which intestate's switch engine was pulling out of at the time of the fatal accident, crosses Meeting Street and curves thence southerly into petitioner's northbound track, the accident having occurred at the switch where intestate stepped off between the northbound and southbound tracks immediately into and against the pilot of the engine of train 79. The distance from Meeting Street Road to the northbound main track, measured perpendicularly, is about six car-lengths or 240 or 250 feet (R., 35). While the evidence shows that the view toward the north from that spur track is obstructed by billboards and shrub-

bery for about half the distance from Meeting Street Road to the main line (R., 33, 35), when intestate's switch engine had reached a point half way between Meeting Street Road and the main-line tracks, *or about 120 to 125 feet*, measuring perpendicularly, from the northbound main line, a train approaching on the southbound main line, as No. 79 was, *could be seen fully 2,000 feet or more to the north* (R., 35, 75, 54, 76, 60). These facts are testified to, without contradiction, by respondent's principal witness, McDonald (R., 29, 30, 33 and 35), who witnessed the accident, as well as by all of the other witnesses testifying thereon. The photograph of the tracks and *locus in quo* in the record just preceding the plat (R., 50) was taken with the camera on the southbound main line about *1,000 feet* north of Etiwan Lead switch where the accident occurred, and the "men" are standing on the Etiwan Lead spur about 270 feet from the switch point, and the photographer testifying for plaintiff, stated that these men could clearly see him when he took the picture (R., 16), which, of course, is necessarily true, and further testified that these men, 270 feet around the curve of the switch from where the accident occurred, could have been seen at a greater distance than 1,000 feet (R., 35, 36). Respondent's witness, McDonald, also testified that a man standing on the footboard of a switch engine at the point where the "men" are standing on the switch in the picture, could see a train approaching on the southbound track a considerable distance north of where the camera was placed, and could even have seen such train just as well if standing a little nearer Meet-

ing Street Road and farther from the point of the accident. Petitioner contends that this undisputed evidence not only does not tend to prove that intestate's view of trains on the southbound main line was obstructed, but affirmatively and conclusively shows that he had a full, open view of the approaching train which struck him, for 120 or more feet, by perpendicular measurement, from the main line and of more than 270 feet along the Etiwan Lead curve to the switch point where he was struck. A calculation shows that when the switch engine, which was running at the speed of six miles an hour, was 270 feet from the switch point, train No. 79, if running at 50 miles an hour, was 2,249.8 feet from the same point, and when the switch engine was 100 feet from the switch point traveling at the same speed, No. 79 was 833 feet away, or less than the distance from where the picture above mentioned was taken, and in plain view then and, in fact, at all times after the switch engine had reached a point half way between Meeting Street Road and the main line. If the purpose of an open view is to enable an employee to look for possible danger and avoid it, the intestate had it here in full measure. If the width and scope of the view required is not to be determined by the opportunity it affords to look for and see impending or possible danger to the employee, we are wholly unable to perceive or understand the criterion which should be adopted. We know of no decision suggesting any other standard, either in the case of an employee, or even in case of the driver of a vehicle at a public highway crossing. Certainly, the railroad company owes no greater obligation to an

employee familiar, as here, with the physical surroundings, and who assumes the ordinary risks of his employment, than it owes to the driver of the vehicle at a public highway crossing; and in the recent leading case of *Baltimore and Ohio R. R. vs. Goodman*, dec. Oct. 31, 1927, the court apparently held that the decedent's negligence was the sole cause of his own death, where he was familiar with the crossing and crossed without stopping or looking, as against the objection that intestate "had no practical view" until he was about *twenty feet* from the first rail or about twelve feet from the danger. Intestate here was fully conversant with his surroundings, having worked there for six or seven months (R., 25).

It may be noted, in passing, that there was no evidence to show whether the alleged obstructions of billboards and shrubbery were on or off petitioner's right of way, and petitioner seasonably moved to strike such allegations from the complaint (R., 8) on the ground that the allegation apparently referred to obstructions on land not belonging to defendant, which motion was denied. The State Supreme Court held in its opinion that it was immaterial whether the alleged obstructions were on or off petitioner's property.

Petitioner submits, therefore, that the evidence does not tend to prove, but wholly negatives, the allegation that intestate's view was obstructed, and the State courts erred in submitting and sustaining this issue of negligence (R., 104, 105, 106).

The State courts likewise plainly erred in holding that there was evidence of negligence in failing to blow

the whistle or give proper signals. Respondent's witness, the conductor, heard No. 79 blow north of the switch. The towerman at Southern Connection Tower, which is about 2,000 feet or one-fourth of a mile north of Etiwan Lead (R., 54), heard it give *four long blows* just opposite or after passing the tower. This would indicate that the blowing continued for some distance after passing the tower. Even at the tower, the evidence shows that train No. 79 was plainly visible from a point on the switch 270 feet from the switch point. The engineer testified (R., 63) that he blew as he passed Southern Connection, and the bell was ringing all the way down, and the fireman testified that the engineer had just finished blowing the whistle for the block at Magnolia Crossing when the accident happened (R., 77), and that the bell was ringing even after the train had stopped after the accident. He also testified that there was a crossing at Southern Connection Tower, and the road crossing signal was given for that, and the whistle was blown almost continuously along there (R., 77). The conductor, who had himself heard the train blow on approaching, testified that it did not blow "right on to him," meaning intestate, but it is obvious that there was no reason whatever for blowing "right on to him," as his danger was not apparent or discernible until almost the very moment of impact, because the undisputed evidence is that intestate, as he stepped off the switch engine, "stepped into 79 there;" "he swung into it, the pilot sill of the engine, as he stepped off" (R., 30, 36). It must also be remembered in this

connection that the switch engine was moving and did not arrive at the switch point until practically the same time that No. 79 reached there. Also, the switch engine was approaching and preparing to enter the northbound main line while No. 79 was on the southbound main line. The evidence further shows that the engineer could not see a man stepping in front of his engine on the other side within less than fifteen or twenty feet in front of the engine. Under the facts, it is plain that neither the engineer nor fireman of train No. 79 had any reason to apprehend intestate would step in front of their engine, until he actually did so, and then it was too late to give any warning or do aught else to protect him. The engineer was keeping a proper lookout just before this accident (R., 68), and saw a Southern Railway engine switching crew at work there about opposite where the accient happened (R., 68). He saw intestate's switch engine coming out of the Etiwan Lead for the northbound track, but was naturally not expecting to find anybody on the southbound track at that place (R., 68), and had never seen the switching crew operating on the southbound track there (R., 69).

The foregoing evidence affirmatively shows, without dispute, that ample signals were given of the passenger train's approach, and it is further shown by the evidence that the engineer of the passenger train had no reasonable cause to apprehend or believe that intestate or anyone else would be on the track at the place of the accident. At this point we may refer to an argument advanced by the respondent below, and apparently relied on by the State Supreme Court in the excerpt from

its opinion quoted, *supra*, at page 3 of this brief, namely, that the engineer of No. 79 should have seen the signals which conductor McDonald attempted to give to intestate to prevent him from stepping off the footboard, and should have inferred from such signals that intestate or someone was about to get in front of train No. 79 on the southbound track. We submit that this argument demands of the engineer a prescience not reasonably warranted by the facts or physical situation. If intestate, who was looking directly at the conductor when the latter was attempting to signal intestate, did not understand the meaning or purpose of the conductor's signals (R., 29, 31), but mistook the signal of warning for one meaning that the switch engine was to back up to the Seaboard track, as the conductor testified, then how could it be expected, with any show of reason, that the engineer could have understood the conductor's signals to intestate to mean that someone was in a place of danger on the Southbound track? The engineer testified that he did not recognize conductor McDonald, although he may have seen him. Petitioner submits that it is pure conjecture and speculation to say the engineer of No. 79 could have understood the conductor's warning signals to intestate at all, or could have done anything to prevent injuring intestate, who stepped immediately in front of the engine on the fireman's side, if the engineer had understood or guessed at the meaning of the conductor's signals; assuming, of course, that he saw them, which the evidence does not show. Besides, it does not appear from the evidence how soon before intestate stepped

off the footboard into the pilot of No. 79, the conductor gave the signal to intestate (R., 28, 31, 38). The evidence rather intimates that the conductor gave intestate the warning to stay on the footboard at the time, or just a moment before, intestate stepped off, as appears from the following questions and answers on page 38 of the record:

> "Q. It *looked like* Driggers was going to step off?
>
> "A. Yes, sir.
>
> "Q. You gave him a warning to stay on the footboard?
>
> "A. Yes, sir." (Italics ours.)

If the conductor gave intestate the warning to stay on the footboard at about the instant he stepped off, then, obviously, the engineer of No. 79 could have done nothing effective to prevent the accident, even if he had seen and understood the conductor's warning signals to intestate.

Petitioner submits, therefore, that the foregoing argument of respondent as to the duty of the engineer to see and act on the conductor's signals to intestate, is based solely on conjecture.

St. L. & San Francisco R. Co. vs. Mills, supra.

While petitioner has heretofore assumed, in discussing the evidence, that signal of the passenger train's approach for the benefit of employees at the point of the accident, might be required by law, we submit that, under the facts and applicable decisions, no signals would be required. Respondent's witness,

McDonald, testified (R., 40) that the place of the accident was in the yard limits. Neither intestate nor anyone else was seen on the track by the engineer, who testified that he was keeping a proper lookout, and in fact, intestate never did get on the track, but was struck immediately as he stepped into the pilot of engine No. 79 in stepping off of his own engine, which was just entering the *northbound* track. The place of the accident was not at or immediately near any public crossing or other point for which signals were required by the rules to be given. Intestate was an experienced railroad man, and had worked on that switching crew for six or seven months, and the crew had used the Etiwan Lead nearly every day. Nor was there any evidence of a custom for main line trains or any other trains to give signals in passing that point or elsewhere in or out of the yard. Under these facts, we do not think that the engineer of passenger train No. 79, which was a regular scheduled train, was required to give any signals.

In the case of *Director General vs. Templin*, 268 Fed., 483 (3rd Circuit Court of Appeals), in which *writ of certiorari* was denied by this Court, 254 U. S. 556, the facts were somewhat analogous to those of the present case, and are thus stated in the opinion:

> "The facts of the case are briefly these: Preparatory to making a stop, Templin's train was moving slowly on a sidetrack next to the southbound main line in defendant's yard at Reading, Pennsylvania. While his train was still moving, Templin jumped down from between two box cars into the space between his train and the

> southbound track, on which an express train was rapidly approaching from the rear. The clearance being insufficient, Templin was struck and killed."

The negligence charged was in failing to give timely warning and signal, "contrary to prevailing custom, adequately to warn the decedent of a train approaching from the rear." The court says that the jury found such a custom of warning to have existed, and that decedent was presumed to have known it, and the holding seems to be based solely on this finding, and it appears from the following quotation from the opinion that, had there not been such a custom of giving warning proved, the judgment must have been for defendant. The court says:

> "The defendant next raised a question of the decedent's assumption of risk and of error in the court's charge in respect thereto, pursuing the question on the theory that express trains moving on the main track did frequently approach, overtake and pass freight trains on the next track without warning; and that the decedent knew it, and, because of this fact and his knowledge of it, the decedent assumed the risks incident to it, citing familiar cases of yard accidents where there existed no custom as to warning and where from the very nature of yard movements warnings were impracticable.
>
> "In raising this question defendant has disregarded the fact and *effect of the custom found*, in which is implied, first, the need of warning, and second, the practicability of giving warning. In Aerkfet v. Humphreys, 145 U. S. 418, 12 Sup.

Ct. 835, 36 L. Ed. 758, *where no custom of warning was involved*, the court held that a yard track employee assumed the risk of the danger of a shifting movement without warning; and in Connelley *v.* Pennsylvania R. Co., 228 Fed. 322, 142 C. C. A. 614, where likewise no question of custom as to warning was involved, and where practically all the tracks in the yard were main tracks, this court made a similar ruling. The case at bar is readily distinguishable from these two cases on which the defendant mainly relies and from two others recently decided by this Court. Hines, Director General *v.* Jasko, 266 Fed. 336, and Erie R. Co. *v.* Healy, 266 Fed. 342. In the first, there being no sufficient proof of custom affecting or defining the duty of the railroad company to warn yard employees of coupling movements, we held that the defendant railroad company had not been shown *guilty of negligence* in the absence of proof of what warning under the circumstances it should and could have given, and that, in consequence, the yard employee had assumed the risks of such movements on accepting his employment. So also in the latter case we found, in the absence of proof of a custom as to warning, a similar assumption of risk by a yard employee. But in McGovern *v.* P. & R. Ry. Co., 235 U. S. 389, 401, 35 Sup Ct. 127, 59 L. Ed. 283, where there was evidence of a custom or practice to warn trackworkers the Supreme Court affirmed the action of the trial court in refusing to hold as a matter of law that the injured workman had assumed the risk of the danger and in submitting the question to the jury." (Italics ours.)

The discussion and cases cited clearly show that, in the absence of custom to give warning of the train's approach to yard employees, there would have been no negligence in failing to give signals. See also the cases there cited.

In the case of *Pheasant* vs. *Director General of Railroads*, 285 Fed., 342 (3d C. C. A.), decedent, a locomotive engineer, with his fireman, was walking down the track, when suddenly the fireman heard a train behind and jumped, but the engineer failed to jump in time and was struck by the train. The only evidence of a possible signal having been given of the train's approach was that a locomotive whistle was heard by decedent's companion a short time before the accident, but, apparently, it was not positively proved that this signal was given by the locomotive which struck decedent. On pages 344 and 345 of the opinion the court says:

> "To sustain the charge that the Reading was negligent because of the failure of its engineer to give the decedent timely warning, we find no affirmance evidence. Point is made of the presence of a crossing just west of the tower and the claim is made that the engineer failed to blow for it, but there is no evidence that it was a public road-crossing calling for the statutory warning by bell and whistle. Opposed to her claim of insufficient warning the plaintiff herself proved that somewhere, and at a time within which the two men walked less than one hundred and fifty feet, a locomotive whistle blew and was heard by the decedent's companion. (This was before the blast which immediately preceded the accident.)

She then produced no evidence even suggesting the possibility that the whistle was sounded by a locomotive other than the one which struck the decedent. And here the evidence stops—in so far as it effects the Reading. It continues, however, by showing negligence on the part of the decedent himself. While such negligence is contributory, and evidence of it is admitted under the Federal Employers' Liability Act ordinarily in diminution of damages, it is, nevertheless, a bar to recovery when it is clear that the proximate cause of the injury, or, stating it, perhaps, more accurately, when it appears that the decedent's death was caused solely by his own carelessness. Virginian Railway Co. *v.* Linkous, 230 Fed. 88, 93, 144 C. C. A. 386, affirmed on rehearing, 235 Fed. 49, 148 C. C. A. 543, certiorari denied, see Linkous *v.* Virginian Ry. Co., 242 U. S. 630, 37 Sup. Ct. 15, 61 L. Ed. 537; Director General of Railroads *v.* Templin, Admx. (C. C. A.), 268 Fed., 483. Such we are constrained to believe is the conclusion inevitably to be drawn from the evidence of this case."

The case of *Chesapeake & Ohio Ry. Co. vs. Nixon*, 271 U. S., 218, involved injury to an experienced section foreman, who was run down by a train while on a velocipede, going to his work from his home. Referring to a contention that the engineer owed decedent an active duty to keep a lookout, the court said:

"If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be

held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The railroad company was entitled to expect that self-protection from its employees. Aerkfetz v. Humphreys, 145 U. S., 418; 36 L. ed., 758; 12 Sup. Ct. Rep., 825; Boldt v. Pennsylvania R. Co., 245 U. S., 441, 445, 446; 62 L. ed., 385, 389; 38 Sup. Ct. Rep., 139; 19 N. C. C. A., 401; Connelly v. Pennsylvania R. Co., 47 L. R. A. (N. S.), 867; 119 C. C. A., 392; 201 Fed., 54; Davis v. Philadelphia & R. R. Co. (D. C.) (220), 276 Fed., 187; Pennsylvania R. Co. v. Wachter, 60 Md., 395; 4 Elliott, Railroads, 3d ed., Sec. 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others."

This rule has been applied to switchmen and yard employees, as well as track employees, and should be particularly applicable here, where the engine which struck intestate was a regular scheduled passenger train (R., 48), and the intestate was struck at a place where signals were not required by any rule, and intestate could not be seen by the engineer at any time after he had gotten in a place of danger. See *Toledo, St. L. & W. R. Co. vs. Allen*, dec. Feb. 20, 1928 (U. S. Sup. Ct.).

The case of *Davis vs. Philadelphia & R. Ry. Co.*, 276 Fed., 187, involved the death of a trackwalker, struck by a main line train from behind. Decedent could have been seen from the engine after reaching a point 2,200 feet from the place of the accident, and no warn-

ing signal was given, but it did not appear that he was seen by those on the engine, and the train was operated in the usual manner. It was held that there could be no recovery, on the ground that decedent was injured as a result of the ordinary risk of his employment. The court referred to the case of *Seaboard Air Line Ry. Co. vs. Koennecke*, 239 U. S., 352, and other cases which permitted a recovery for injuries received on main line track where no signals were given, and thus distinguished such cases:

> "On examination of the cases where recovery was allowed for accidents occurring on main line tracks, it will be observed that failure to observe a known rule or order of the company, coupled with want of reasonable care, is assigned as a foundation upon which such recovery is rested. In the cases depended on by defendant's counsel, the distinction from the case in hand may be noted as bearing on the conclusion reached."

In the *Koennecke* case it may be noted, the train was backing into the yard on the main track, without a lookout in front, in direct violation of a rule of the company, which clearly distinguishes it from the present case.

Another ground of negligence alleged and relied on by respondent (R., 3) and submitted to the jury (R., 81, 82) was in operating the passenger train at a speed limit greatly in excess of that allowed by the rules and regulations of the railroad company, and greatly in excess of the speed at which trains are allowed to be

operated within its yards. This ground of negligence is also not proved by any evidence, but is expressly negatived by the evidence. The speed of passenger train No. 79 is given by the witnesses as having been from thirty-five or forty to fifty miles an hour, the latter being the maximum speed testified to by any witness (R., 61, 54, 72, 76, 41). Respondent's principal witness, the conductor, McDonald, did not know whether the speed limit at the point of the accident was forty or fifty miles an hour (R., 41), but the rules put in evidence, and testimony of other witnesses, show conclusively that the speed limit for train No. 79, a local passenger train, at that point, was fifty miles an hour (R., 68, 48, 49). "First class trains," such as this passenger train, had a speed limit of fifty miles an hour except at certain "points," where "semaphore interlocking signals are in service," which points are stated in the rules put in evidence (R., 48, 50). The nearest one of these points to the place of accident is (R., 49) "Southern Connection (main line train)," where the limit for passenger trains is forty miles an hour, but Etiwan Lead switch, where the accident occurred, is about 2,000 feet south of Southern Connection, between that and Magnolia Avenue Tower (R., 54, 52). The term "Southern Connection" as there used means only the signal tower itself (R., 56). This fact is also indicated by the manner in which the signal points are listed in the speed limitation instructions (R., 48, 49).

Petitioner further submits, in this connection, that even if the evidence had shown that the speed limit

was violated at the place of the accident, such fact could not possibly have been a proximate cause of the accident, for the reason that intestate stepped immediately in front of the approaching train, and the rate of speed of the train, whether it was running at forty or fifty or more miles an hour, was not a contributing cause of the accident. This obvious proposition is illustrated by the South Carolina case of *Patterson vs. Director General*, 115 S. C., 390, 396, where it was held that the speed of the train was not a proximate cause of an injury, where the railroad train did not run into plaintiff's engine, but his engine ran into the train.

A case which is in point, in principle, on the question of alleged negligence herein in failing to give signals or see intestate and stop train, is *Southern Railway Co. vs. Gray*, 241 U. S., 333. That was an action for the death of a brakeman who had gone to sleep on the track, after setting out signal lights to warn an expected passenger train, and it appeared that the engineer of the passenger train sounded the customary flagman's signal when it first became possible to see the signal lights, and almost immediately thereafter, when the engineer first saw decedent on the track, did everything possible to check the train, but was unable to stop the train before running over decedent, after seeing him on the track. The court said:

> "Negligence by the railway company is essential to a recovery; and there is not a scintilla of evidence to show this under the most favorable view of the testimony urged by counsel for

> defendant in error. When it first became possible for the engineer to see signal lights 1,254 feet away he had a right to suppose the brakeman was standing there on guard. Immediately, he says, the customary signal was sounded. *No duty to the brakeman demanded an instant effort to stop the train—the indicated danger was more than half a mile away.* Moreover, application of emergency apparatus on that moment, it appears, would not have caused a stop in time to prevent the accident. There is no evidence that the engineer could have seen the brakeman a *single moment before he did*, or omitted thereafter to do all within his power." (Italics ours.)

This language is directly applicable here. Passenger train No. 79 had given signals of its approach, although we do not think any were legally required to be given; certainly no duty to intestate, Driggers, demanded of the passenger train an effort to stop or slacken speed until intestate was on the track or in a place of danger adjacent thereto, and the undisputed evidence shows that intestate was not seen and could not be seen until practically the very moment he was struck. Intestate's engine was entering the adjacent northbound track, and he was in no danger from the approaching passenger train on the southbound track until he stepped off between the tracks, and all the evidence is that he stepped off without looking in the direction of the approaching train at the very moment the passenger train was passing, and the engineer of train No. 79 never did see him, and

the fireman only saw him as he was stepping off directly against the pilot of the passenger train. Petitioner submits, therefore, that the principle of the *Gray* case is directly applicable here.

Not only is no negligence proved herein, but it is apparent, petitioner submits, that the sole proximate cause of intestate's death was his own act or omission, in stepping from the front footboard of his own engine into the pilot of the approaching passenger train, without looking or taking any precaution whatever for his own safety. He did not look toward the north and the approaching passenger train before stepping off (R., 38). As heretofore shown, he had ample view of the approaching passenger train for a distance of 1,000 to 2,000 feet or more, at all times after he had reached a point 120 feet, measuring perpendicularly, from the main line (R., 35, 75, 60, 76), Signals had been given by the passenger train, which were heard by other employees.

It is difficult to imagine a clearer case, where the injury was caused solely by the employee's own negligence. Under such circumstances, the railroad company will not be held responsible.

Great Northern Ry. Co. vs. Wiles, 240 U. S., 444.

Another alleged ground of negligence somewhat relied on by respondent, and which was submitted to the jury by the trial court (R., 84), was in failing to provide sufficient space between petitioner's tracks to enable its employees to safely board and alight from its trains. The evidence showed that the northbound

and southbound main tracks at the point of the accident are twelve feet apart, measured perpendicularly, from center to center (R., 27), and that railroad tracks are standard and laid down with regularity, and that there is usually a standard distance between double tracks (R., 27). Petitioner submits that this constitutes no evidence of negligence. Furthermore, it is held in the recent decision of *Toledo, St. L. & W. R. Co. vs. Allen*, U. S. Sup. Ct., dec. Feb. 20, 1928:

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. Baltimore & O. R. Co. v. Groeger, 266 U. S. 521, 529, 69 L. Ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 194, 30 L. Ed. 1114, 1116, 7 Sup. Ct. Rep. 1166; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 482, 27 L. Ed. 1003, 1005, 3 Sup. Ct. Rep. 322; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Having regard to plaintiff's knowledge of the situation, it is clear that the evidence when taken most favorably to him is not sufficient to warrant a finding that defendant failed in any duty owed

> him in respect of the space between the tracks. Missouri P. R. Co. *v.* Aeby, *supra*. The court erred in submitting that question to the jury."

The picture of the tracks in the record (R., 50, 51) shows the distance between petitioner's main line tracks, and also shows the distance between its tracks to be substantially the same as that between the two Southern Railway tracks at the right of the picture.

In closing the discussion of the question of negligence, it may be pertinent to note that the State Supreme Court held in this case, as appears from its opinion (R., 117), that the "scintilla of evidence" rule is applicable in cases decided under the Federal Employers' Liability Act. It is said:

> "In the Dutton case, *supra*, affirmed by the United States Supreme Court, this Court held that the 'scintilla of evidence' rule is applicable to cases brought under the Employers' Liability Act and that the same rule of procedure applies to the administration of that Act in the State Court as it does to the administration of State laws."

While the State Supreme Court of South Carolina did so hold in the *Dutton* case, and has so held in several other cases, including the instant case, it is submitted that this Court has never held that the "scintilla of evidence" rule is applicable in actions under the Federal Employers' Liability Act, or in any other case; on the contrary, it is the well settled rule of the Federal courts that the so-called "scintilla"

rule is not applicable in Federal courts or in cases involving Federal questions.

Hathaway vs. East Tennessee, B. & G. R. R., 29 Fed., 489-490.

Berry vs. Chase, 146 Fed., 625, 627 (Sixth Circuit, C. C. A.).

Interstate Compress vs. Agnew, 276 Fed., 882, 887 (Eighth Circuit, C. C. A.).

It is possible that the erroneous view of the State Supreme Court that this so-called rule of evidence was applicable in actions under the Federal Employers' Liability Act led it to hold that there was sufficient evidence of negligence in this case. Its further holding, implied from the above quotation from its opinion, that the question of the sufficiency and amount of evidence necessary to establish negligence is for the decision of the State courts under their own rules of evidence, is also clearly erroneous, as this Court held in the *Coogan* case that "the kind or amount of evidence required to establish it (negligence) is not subject to the control of the several States."

It is earnestly submitted that there is no evidence whatever tending to show negligence herein, and that judgment of the State Supreme Court should be reversed for this reason, irrespective of other errors hereinafter discussed.

Point II.

Under the evidence intestate assumed any risk of injury from stepping between the tracks, the danger

being obvious and he having knowledge of all relevant circumstances.

The defense of assumed risk was set up in petitioner's answer (R., 11), and was included in its exceptions on appeal (R., 99), and was also passed on by the State Supreme Court in its decision (R., 117).

The undisputed evidence shows that intestate was an experienced railroad man, and had worked for the railroad company about five years, and had worked with the yard conductor, with whom he was working when killed, for six or seven months (R., 25). His brother-in-law testified for respondent that he himself had seen intestate with the engine on the Etiwan Lead once or twice (R., 22). Intestate was a member of the switching crew and they used the Etiwan Lead switch every day, and sometimes more than once a day (R., 40). Under these facts, intestate was necessarily familiar with the physical surroundings at the place of the accident, and must have known of the dangers attendant upon his conduct in stepping off between the tracks, as he did, without taking the slightest precaution for his own safety. Train No. 79 which struck him was a regular scheduled passenger train and was about nine minutes late at Ashley Junction, several miles north of the place of the accident (R., 48). As an experienced railroad man, therefore, he would reasonably be charged with knowledge that this train might pass along at the time it was due or any time thereafter.

The law of assumed risk under the Federal Employers' Liability Act is well settled. Intestate, as an experienced switchman in the yard, assumed the or-

dinary risks of that employment, which would include the coming and going of trains.

Nixon case, *supra*.

Ackfertz vs. Humphreys, 145 U. S., 418.

With respect to *extraordinary risks*, including risks arising from the master's negligence, the rule is thus stated in *Boldt vs. Penna. R. Co.*, 245 U. S., 441, 445;

> "At common law the rule is well settled that a servant assumes *extraordinary risks* incident to his employment, or risks caused by the *master's negligence which are obvious or fully known and appreciated by him*. Shearm & Redf. Neg., 6th ed., 208; Bailey, Personal Injuries, 2d ed., Sec. 385. This general doctrine was clearly recognized in Gila Valley, G. & N. R. Co. *vs.* Hall, 232 U. S., 94, 101, 58 L. Ed., 521, 524, 34 Sup. Ct. Rep. 229; Jacobs *vs.* Southern R. Co., *supra*; Chesapeake & O. R. Co. *vs.* De Atley, 241 U. S. 310, 313, 60 L. ed. 1016, 1019, 36 Sup. Ct. Rep. 564; and Erie R. Co. *vs.* Purucker, 244 U. S. 320, 324, 61 L. ed. 1166, 1167, 37 Sup. Ct. Rep. 629." (Italics ours.)
>
> See also the recent case of *Toledo, St. L. & W. R. Co. vs. Allen, supra*.

Petitioner submits that under the facts set out and the foregoing rules of law, it is clear that intestate would assume any risk of injury by reason of the so-called obstructed view (which did not exist in fact), or by reason of the alleged insufficient width between the main line tracks. The *Allen* case, *supra*, is directly in point on the latter question, as the court there held

that an experienced car checker, familiar with the yards, assumed any risk incident to the tracks being too close together, because "the dangers were obvious and must have been fully known and appreciated by him." Under this case and the authorities cited therein, intestate would also assume the risk of injury from the passing of trains through the yards and along the main line in the yard limits, at least if they were operated in the usual manner and in accordance with the company's rules. No violation of any rule of operation is shown by the evidence herein. It is difficult to discuss questions of assumed risk with respect to negligence in a case where, as here, the record is so free of any evidence of negligence, but we respectfully submit that under the foregoing authorities the intestate would assume, either as an ordinary or extraordinary risk, all of the dangers arising from the grounds of negligence alleged and relied on by respondent. The mere fact that intestate may have momentarily forgotten that passenger train No. 79 had not passed, or may even have forgotten the possibility of trains coming along on the southbound main line, would not relieve him from the assumption of those risks.

Jacobs vs. So. Ry. Co., 241 U. S., 229.

Point III.

The State court erred in sustaining instructions that it would be a violation of law to operate the train at a high and dangerous rate of speed and in excess of the speed allowed in the yard; there being no evidence that

the speed was in violation of law or in excess of that allowed in the yards.

This assignment of error is raised by petitioner's exceptions on appeal (R., 102), and was considered by the State Supreme Court.

The trial judge gave the following instruction (R., 81, 82) in submitting this issue:

> "The next specification is (*b*):
>
> "'In operating the said train at a high and dangerous rate of speed, and at a rate of speed greatly in excess of that allowed by the rules and regulations of the defendant company, and greatly in excess of the speed at which trains are allowed to be operated by the defendant company within its yards.'
>
> "Well, it would be a *violation of law* for a railroad company to operate its train at a high and dangerous rate of speed, and in excess of that *allowed by law*, and it would be a *violation of law to operate in excess of the rate of speed allowed in the yard*. All that may be negligence and carelessness in the defendant, and if that was the direct and proximate cause of the injury to the plaintiff, the plaintiff would be entitled to recover on that act of negligence." (Italics ours.)

He also gave the following similar instruction on the subject (R., 82):

> "The next specification is subdivision (*c*):
>
> "'In operating the said train at such an excessive rate of speed as to prevent the plaintiff's intestate from getting out of the way of the

said train, and so to avoid being run over by it.'

"Well, if they did that, *that was a violation of law*, but whether or not they did that is a question for you to answer from this evidence. If the defendant did that, and that was negligence and carelessness and that negligence and carelessness was the direct and proximate cause of the plaintiff's injury and death, the plaintiff in this case would be entitled to recover on that act of negligence." (Italics ours.)

The State Supreme Court in the part of its opinion dealing with this charge (R., 122) concedes that "His Honor's language as complained of in charging that certain conduct alleged was in violation of law, has given me some trouble," but concludes that a careful reading of the whole charge convinces the court that "it was a slip of the tongue, and not prejudicial." Petitioner submits that this charge is erroneous and prejudicial in several respects. There is not a scintilla of evidence in the record tending to show that passenger train No. 79 was operated at a speed "greatly in excess of that allowed by the rules" or "greatly in excess of the speed" at which trains are allowed to be operated within the yards, or that it was operated at a dangerous rate of speed, in any legal sense; on the contrary, the undisputed evidence shows that the train did not exceed the fifty-mile limit allowed by the rules, at the point of accident (R., 68, 48, 49), and no rules are put in evidence limiting the speed of trains in yards generally. Neither is it shown that any *law* was violated by the speed of the train at the point of the accident. These instructions, therefore,

were clearly erroneous as submitting issues to the jury without any support whatever in the evidence. The language of the court that the conduct specified would be "a violation of law" would tend to indicate that some positive law prohibiting speed at the point in question was violated, but whether it be taken to mean this or to mean that such conduct was a violation of the law in a general sense, such as the general law of negligence, the instruction was nevertheless wholly unsupported by any evidence and permitted the jury to find that the petitioner was guilty of negligence in those respects and also to speculate whether there had been any "violation of law" without any evidence to show such violation, and even without any direction from the trial judge limiting their speculation or guesses as to what would constitute a violation of law. In the case of *St. Louis, S. F. R. Co. vs. Mills*, 271 U. S., 344, the court distinctly held that it was reversible error to submit to the jury distinct issues of fact, which were without any support in the evidence. The court said:

> "The evidence must at least point to the essential fact which the jury is required to find in order to sustain the verdict."

The prejudicial effect of these instructions is emphasized by the court's further charge, in concluding his submission of the issues (R., 87), that plaintiff must recover, if at all, "on *one* or *more* or *all* of these acts of negligence charged." In other words, the court permitted the jury to find for respondent gen-

erally on any *one* of the issues submitted, and, so far as this record shows, the jury may have found for plaintiff on the issues submitted by these instructions, which were without any support whatever in the evidence. It will also be noted from a careful reading of the instruction first set out above, submitting specification (*b*), that it really *assumes* that petitioner operated its train in excess of the rate of speed allowed in the yard and in excess of that allowed by law, as the instruction does not require a finding of these facts. Errors in instructions are presumptively injurious and ground for reversal, unless it affirmatively appears that they were harmless. These instructions are plainly erroneous and prejudicial in submitting important issues and questions of fact to the jury, without any supporting evidence.

Mills case, *supra*.

Fillippon vs. Albion Vein Slate Co., 250 U. S., 76.

Point IV.

The State court erred in sustaining an instruction that an employee does not assume any extraordinary hazards or risks, and in sustaining refusal of a correct charge requested by petitioner.

This question is raised by petitioner's fifteenth and twenty-fifth exceptions (R., 101, 102, 107, 108).

The instruction given by the court on assumed risk reads:

> "Now the 9th paragraph sets up assumption of risk, and the law in regard to that is this:

> Whenever a master employs a servant, and when I say master, I mean railroad company, and when I say servant, I mean the deceased, whenever a master employs a servant, the servant assumes all the risks ordinarily incident to the work that he is employed to do. That is just as binding on the servant as a written contract. *He assumes all ordinary risks; he does not assume any extraordinary hazards or risks, just those risks connected with his work.* And if the death of the deceased was caused by an ordinary risk he assumed that; if that was the cause of his death he assumed that." (Italics ours.)

Petitioner requested the court (R., 101-102) to give the following charge on assumed risk:

> "5. I charge you that an employee may assume the risk of injury from dangers and hazards which are ordinarily incident to his employment, or which arise in the progress of their work. Some employments are necessarily dangerous and fraught with danger to the workman, danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in the contract of employment. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. Risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for

> the work, and so forth. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. If, however, he does actually know and appreciate the danger or risk, or by the exercise of proper care and caution should have known and appreciated the danger or risk, then he is held to have assumed such risk, and cannot recover."

The trial court refused to give this requested instruction, which was petitioner's fifth request (R., 92). Petitioner submits that the charge given by the court is clearly erroneous, in that it affirmatively charges that the employee "does not assume any extraordinary hazards or risks, just those risks connected with his work."

It is well settled by numerous decisions of this Court that an employee does assume the extraordinary risks of his employment, including those due to the negligence of the employer and fellow-employees, where such risks are obvious or fully known and appreciated by the employee. In the case of *Toledo, St. L. & W. R. Co. vs. Allen, supra.*, the court said:

> "And, except as specified in Sec. 4 of the Act, the employee assumes the ordinary risks of his employment and, when obvious or fully known and appreciated by him, *the extraordinary risks and those due to negligence of his employer and fellow employees.* Boldt v. Pennsylvania R. Co. 245 U. S. 441, 445, 62 L. ed. 385, 389, 38 Sup. Ct.

Rep. 139, 19 N. C. C. A. 461; Chesapeake & O. R. Co. v. Nixon, 271 U. S. 218, 70 L. ed. 914, 46 Sup. Ct. Rep. 495. If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 474, 70 L. Ed. 1041, 1043, 46 Sup. Ct. Rep. 564." (Italics ours.)

It will be noted that the instruction given by the court was confined solely to the "ordinary risks" of the employment. Referring to a somewhat similar question, the court, in *Chesapeake & O. R. Co. vs. De Atley*, 241 U. S., 310, 316, said:

"Error is assigned to the refusal of the trial court to instruct the jury as follows: That when plaintiff entered defendant's service as brakeman he assumed all the ordinary risks and hazards of that employment, and if the jury should believe from the evidence that his injuries were the natural and direct result of any of such risks or hazards they must find for the defendant. The instruction thus requested was defective, and there was no error in refusing to give it in this form, *since it embodied no definition of 'ordinary risk or hazards,'* nor any qualification appropriate to the particular facts of the case. The gravamen of plaintiff's complaint, as developed at the trial, and the sole theory upon which the case was submitted to the jury, was that the negligence of the engineer in operating the train at an unduly high rate of speed created an unusual and extraordinary hazard. *An instruction upon the ques-*

> *tions of assumption of risk, dealing solely with the ordinary hazards of the employment and not pointing out that a different rule must be applied with respect to an extraordinary 'risk attributable to the engineer's negligence' would probably have confused and misled the jury.*" (Italics ours.)

The instruction given in the present case, like that given in the *De Atley* case, embodied no definition of "ordinary risks and hazards," nor did it define in any way the words "extraordinary hazards or risks." It is clear, therefore, that the instruction is erroneous under these decisions. However, the State Supreme Court, in its opinion, held that the giving of the following additional instruction avoided any misleading effect in the instruction given:

> "And there is a corresponding duty on the servant. The servant has a right to assume that the master has furnished him a reasonably safe place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the master has performed his duty. But if the place is dangerous—obviously dangerous, and can be seen by the servant, and he goes on and performs his duty after *knowing that*, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you,

> you could see it and *knew* it, and you undertook to work in that place and you got hurt it would be your fault. Whether that happened in this case I don't know." (Italics ours.)

This instruction is, in fact (R., 84, 85), a part of the court's instruction on *negligence*, and is not given as a part of its charge on assumed risk. It will be noted that it was given in submitting specification (*i*) of negligence "in failing and omitting to furnish plaintiff's intestate with a reasonably safe place to work at, and in failing and omitting to provide sufficient space between the defendant company's tracks to enable its employees to safely board and alight from its trains while in the performance of their duties." It would appear, therefore, that the trial judge himself confused the question of negligence and assumed risk, and it is hardly likely that the jury could have obtained a clear idea of the rule from these confusing instructions. The fact that the trial judge refused petitioner's request on the subject indicates that he did not have a correct understanding of the rule with respect to extraordinary risks, including risks from the master's negligence. Moreover, the instruction given by the court in charging specification (*i*) of negligence was itself erroneous and defective because, as indicated by the italicized language, it required the employee to actually *know* of the danger before he assumed the risk therefrom. We have here, then, a clearly erroneous instruction on assumed risk, the refusal of a proper instruction on the subject, and the giving of a partial instruction on the subject, as a part of the charge on

particular issues of negligence, which was itself erroneous and misleading in requiring that the dangers be actually known, as well as be obvious. The question of assumed risk, as we have heretofore pointed out, was raised by the evidence both with respect to the assumption of ordinary risks and the extraordinary risks of the employment, including the master's negligence. The court's action in giving and refusing these instructions was clearly erroneous and misleading, and must necessarily have been prejudicial. Certainly, it cannot be said from the record that it was not prejudicial.

Fillippon vs. Albion Vein Slate Co., 250 U. S., 76.

It may be noted that the judge who tried this case is the same judge who tried the case of *Atlantic Coast Line Railroad Co., Petitioner, vs. C. M. Tyner, as Administrator of George A. Marshall*, No. 747, Oct. Term, 1927, in which this Court granted its *writ of certiorari* on March 12, 1928. The trial judge gave the same erroneous instruction on assumed risk in the *Tyner* case as that given here.

Conclusion.

If the judgment rendered against petitioner herein were permitted to stand, railroad companies would, in its opinion, become practically insurers against injuries to employees engaged in interstate commerce at the time of injury, even in cases where the injury is caused solely by the employees' own acts or neglect. Only the principal errors committed in the trial of this

case have been relied on in the petition and discussed in this brief, but, as stated in the able dissenting opinion of Cothran, J., "there are other errors in the conduct of the trial of which 'the time would fail me to tell,' but these suffice."

It is earnestly submitted that the judgment of the State court against petitioner should be reversed.

Respectfully submitted,

THOS. W. DAVIS,
Attorney for Atlantic Coast Line Railroad Company, Petitioner.

SIMEON HYDE,
R. McC. FIGG, Jr.,
V. E. PHELPS,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement of facts	1
Argument	10
Evidence of negligence	10
No assumption of risk	18
Charge on speed	21
Charge on assumption of risk	22

Table of Cases Cited.

Baltimore & Potomac R. R. vs. Mackey, 157 U. S., 72	24
Booth vs. White Engineering Co., 101 S. C., 483	24
Chesapeake & Ohio R. R. Co. vs. Proffitt, 241 U. S., 462	20
Chicago, R. I. & P. R. Co. vs. Ward, 252 U. S., 18	20
Gila Valley, etc., R. Co. vs. Hall, 232 U. S., 94	20
Great Northern Rwy. vs. Knapp, 240 U. S., 464	17
Hartwell vs. Columbia Mills, 112 S. C., 177	24
Illinois Central Rwy. vs. Skaggs, 240 U. S., 66	17
Kell vs. Rock Hill Fert. Co., 123 S. C., 199	20
Milwaukee Rwy. Co. vs. Kellogg, 94 U. S., 69	13, 17
Seaboard Air Line Rwy. Co. vs. Hollis, 20 Ga. App., 535	21
Seaboard Air Line Rwy. vs. Koennecke, 239 U. S., 352	17
Seaboard Air Line Rwy. vs. Lorick, 243 U. S., 572	17
Seaboard Air Line Rwy. vs. Padgett, 236 U. S., 668	17
Spaulding vs. Castro, 153 U. S., 38	24
Village of Evanston vs. Gunn, 99 U. S., 660	24
Wrightsville & T. R. Co. vs. Gornto, 129 Ga., 204	21
Yazoo & Miss. Valley R. R. Co. vs. Wright, 235 U. S., 376	20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 225

ATLANTIC COAST LINE RAILROAD COMPANY,
PETITIONER,

v.

MARCELLA DRIGGERS, AS ADMINISTRATRIX OF WILLIAM A. DRIGGERS, DECEASED, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This action was brought to recover for the death of plaintiff's intestate, William A. Driggers, employed by petitioner at Charleston, South Carolina, as a brakeman in a switching crew, who was killed when he obeyed a signal given him by his conductor and stepped from the front running board of his own engine, while it was slowly traveling south on the main line track, and alighted between his engine and the southbound main line track running parallel with it, when he was

struck by a southbound train coming from behind at a high and excessive rate of speed in the yard limits, and at a greater rate of speed than that permitted by the rules of the railroad company, without giving any signal of its approach when it was near enough for him to hear it; this occurring, not as the petitioner erroneously sets out in the opening of its statement of facts, at a place where Driggers had a clear view of the approaching engine for two thousand feet for a distance of one hundred feet or more before reaching the main line, but, on the contrary, *at a place where Driggers, in the discharge of his duty, was traveling and had for some distance been traveling on the front running board of an engine headed south and southwest, away from the direction from which the passenger train was coming, with his attention fixed upon his conductor who was standing some distance away to the southwest, giving him signals, and with his view of the train or any other object approaching from the north completely obstructed by the body and cab of the engine on which he was riding.*

We believe it is especially important to bear in mind the position of Driggers on the front running board of his engine, the direction in which his engine was traveling, and the position of the conductor, who was on the ground signaling to Driggers from a point toward which he was traveling. We respectfully submit that a careful consideration of these facts together with the plan of the tracks and the adjacent topography will reveal that plaintiff's intestate was not in a posi-

tion to see the approach of the train which struck him for the entire time during which his engine was traversing the southwestward curve into the main line track; first, because of the interposition of billboards and shrubbery, and, next, because of his position on the engine and the direction in which it was traveling after it had passed these obstructions; and, in addition to his inability to see the approaching train, that *his duty required him* to keep his eyes turned upon his conductor in a direction opposite to that from which the train that struck him was coming, so that when petitioner emphasizes throughout its brief the fact that Driggers did not see the approaching train, the true explanation is that Driggers, from his position and the direction of his engine, *could not* see the approaching train; and that, in addition to these facts, his duty at the time required him to look in an opposite direction.

Conductor McDonald testified that as the Driggers engine reached the main track, Driggers was on the right-hand front footboard facing south (R., 30), and that Driggers could not see the train coming from the north (R., 41).

In detail, the circumstances surrounding Driggers' death were as follows:

In the locality where Driggers was killed Meeting Street road runs north and south, parallel to the main line tracks of the defendant company and the Southern Railway Company. At a point east of Meeting Street a spur track of the company runs from a coal yard,

crosses Meeting Street, and then runs southwestwardly toward and connects with the main line tracks of the company (for details see sketch of R. C. Rhett, reproduced in Transcript of Record opposite page 50. We believe it will serve to prevent confusion if we point out in connection with this sketch, that it is a photographic reproduction considerably reduced in size from the original, and the notation of the surveyor to the effect that the scale is 1 inch to 50 feet was merely photographed together with the sketch and does not apply to the reproduction, but to the original, and cannot be used. We are making this notation with the consent of counsel for petitioner.) Shortly before he was killed Driggers was working on an engine running on the spur track leading from the coal yard to the main line tracks of the company. The main line on the right of way with which this spur track connects runs north and south with a down grade in the southerly direction, so that the engineer on a train going south can see an engine on the spur track for a distance of at least two thousand (2,000 feet (R., 57), and before anyone on the footboard of the engine on the spur track could see his train on the main line (R., 15).

Driggers was sitting with McDonald, his conductor and yard foreman, on the back of the engine, and on approaching Etiwan was told by the foreman to cut out a car, and the conductor got out and opened the switch, throwing a red board on the track at Magnolia crossing (R., 28). After cutting out the car, Driggers

stepped up to the right hand footboard on the front of his engine (R., 28).

The engine on which Driggers was riding proceeded around a curve southward from Meeting Street road towards the southbound track of the company (R., 30), a sketch and a photograph of which appears opposite page 50 of the case. At that time tall billboards and shrubbery and bushes ten (10) or twelve (12) feet high (R., 19) were situated immediately north of the spur track on which engine No. 164 was proceeding in the angle between the spur and the main line, preventing Driggers, on the engine, from seeing a train coming south on the main line, and after an engine traveling on the curve toward the main line had passed those obstructions it had already turned so much toward the south that a man standing on the foot board in front of the engine could not see a train coming from the north on the main line (R., 41). The billboards obstructing the view between the Driggers train proceeding on the Etiwan Lead to the main track and the train coming south on the main line were there at the time Driggers was killed and were removed subsequent to that time and prior to the trial (R., 28).

As the engine approached and gained the main track, Driggers was standing in front on its right hand footboard, *facing south*, the direction *opposite* that from which train No. 79 was coming, and was looking ahead at McDonald, his conductor and yard foreman, who had dismounted sometime before and was at the time signaling to Driggers (R., 59, 30). As Driggers

stepped off his engine for the purpose of throwing a switch, getting off on the right side of the engine, which was the proper way for him to get off (R., 31), stepping between the tracks and turning to get his balance (R., 38), he was struck by train No. 79, running at a speed of *at least* fifty (50) miles an hour (R., 28) *within the yard limits* (R., 40) in a section where the instructions of the company limited the maximum speed to forty (40) miles per hour (R., 50, 55, 56), and a place which the engineer of No. 79 knew was constantly used for the purpose of shifting cars back and forth and where he had many times seen employees coming out of Etiwan Lead on shifting engines (R., 65). Despite his speed and his knowledge of the locality, Engineer Brandt proceeded without keeping a lookout and without blowing his whistle to warn the employees of his coming (R., 29), although he was behind his schedule and was not expected at the time (R., 32). If Brandt had kept a proper lookout he would certainly have seen Conductor McDonald in the open on his right when McDonald was signaling to Driggers and his attention would have been called to Driggers' position (R., 28-29).

Before approaching the main track Driggers' vision was obstructed by the shrubberies and billboards (photograph opposite page 50), and when approaching the main track his duties required him to look south in the direction in which his engine was proceeding (R., 30-31), and his engine had by that time turned almost directly toward the south and made it impossible for a

man in his position to see a train approaching from the north behind him (R., 41). If the engineer had kept a lookout on train No. 79 he could have seen engine No. 164 at a distance of at least two thousand (2,000) feet before approaching it, the telegraph operator having been able to see Conductor McDonald from his tower two thousand (2,000) feet away (R., 55, 57). It was well known that the point at which train No. 79 struck Driggers was frequently used for switching purposes, making it necessary for employees to get on and off the switch engine sometimes at intervals of five (5) or ten (10) minutes (R., 58). The exhaust of engine No. 164 prevented Driggers from hearing the blowing of a whistle at a long distance, but he could have heard it if the engineer had blown it nearer to him (R., 29). Engineer Brandt saw ahead of him the switching engine on the front of which Driggers, who was looking in the opposite direction at the conductor's signals, was riding (R., 69), and the engineer knew that members of the switching crew were likely to alight from the engine at the point where he saw it, and he also knew that a man on the switching crew could not hear a whistle blown a long distance away, because of the noise of his own engine, but could hear a whistle blown at a short distance (R., 29). He did not slacken his speed or bring his train under control. He testified that he ran his train three or four train lengths after he struck Driggers and could not stop it before, though he used the emergency brakes (R., 62). From this statement of the engineer it is obvious that

his speed was excessive, since Conductor McDonald, who was in the employ of the company at the time of the trial, testified that if Brandt had operated the train at forty (40) miles an hour, the maximum speed permitted at Southern Connection (R., 49), he would have been able to stop the same within a train length or a train length and a half (R., 29). The evidence also affirmatively shows that the train was operated at this point, which was constantly used for switching and known by the engineer to be used for such purposes (R., 65) and was within the yard limits, at a speed of *at least* fifty (50) miles an hour, although the maximum speed allowed anywhere on the main line for first class trains is fifty (50) miles (R., 48) and although the instructions issued to the employees of the company provided in heavy black-face type for "speed on all trains to be reduced when not consistent with safety" (R., 49). It is fair to assume that when a witness, who is still in the employ of the defendant company and under the eye of his superior officers, testifies that a train was traveling at a speed of "at least" fifty miles an hour, his opinion was that the train was traveling faster than fifty miles an hour and that he is stating that as the minimum of speed which he believed it was making at the time.

No signal was given to the train coming south to indicate that Driggers and his co-employees were working at that point (R., 34), although such signal had been given to trains that might be coming north (R., 28). McDonald, who had gotten off the engine some time before Driggers and who had walked fifteen

(15) or twenty (20) feet west to look for a train, saw train No. 79 coming, the view between him and the train being unobstructed (R., 40), and signaled to Driggers in such a manner as to lead Driggers to understand that McDonald was telling him that they were going to shove back to the Seaboard Air Line track and not that he was in darger of being struck by a train, there being no distinction under the rules and regulations of the company between a signal showing that a train was coming and that one was in danger of being struck by it, and a signal showing that the engine on which the receiver of the signal was standing was to be shoved back into another track (R., 29, 31), and in this instance Driggers understood that the signal indicated that they would back into the Seaboard Air Line track as he had expected they would (R., 31), and accordingly jumped from the engine to attend to the necessary switching for that operation, acting on what he took to be the conductor's signal to that effect, and as it was his duty to do.

The evidence showed that Driggers at the time of his death was twenty-eight (28) years old, earning six and 16/100 ($6.16) dollars a day, and that he left surviving a widow and two (2) children, one of which was three (3) years old at the time his father was killed and the other of which was born after Driggers' death (R., 46). The jury found for the plaintiff in the sum of twenty-five thousand ($25,000) dollars.

ARGUMENT.

For convenience we shall discuss the points raised by the petitioner in the order in which they are set out in its brief.

Point 1.

Evidence of Negligence.

There was abundant evidence in this case to show negligence on the part of the petitioner as charged, proximately causing intestate's death. We group and summarize the details of this evidence as follows:

a. The petitioner permitted the presence of billboards, shrubbery, and bushes ten (10) or twelve (12) feet high to obstruct the vision of Driggers on the switch engine and to prevent him from seeing train No. 79.

b. The engineer of train No. 79 failed to keep a proper lookout, although from his position at the top of a grade he could see the engine on which Driggers was working, and with the exercise of due care he would have seen Conductor McDonald standing on the right side of the tracks, signaling to Driggers, and would have tried to ascertain the cause of the signals Conductor McDonald was giving and would have acted accordingly.

c. The engineer of train No. 79 operated it in the yard limits in excess of fifty miles per hour, the maxi-

mum speed permitted at any point, and a speed which he knew was not consistent with safety at the place which he was approaching.

d. Although the engineer knew that the place which he was approaching was constantly used for switching, and actually saw some of the crew working there, he failed to reduce or slacken his speed while going at the rate of over fifty (50) miles per hour in and about a section known as Southern Connection, although the instructions to the petitioner's employees were that the maximum speed there should not exceed forty (40) miles per hour, and that at no time or at any place should the maximum speed exceed fifty (50) miles per hour, and that in any event the speed should be reduced when not consistent with safety.

e. Although Engineer Brandt saw or should have seen Driggers' engine, if he had kept a proper lookout, and although he knew of the presence of workers in that locality, alighting from switch engines at frequent intervals, and although he also knew that a man on a moving switch engine could not hear a whistle blown a long distance away because of the noise of his own engine, but could hear one blown nearer, he did not blow any whistle when he drew near the place so as to warn Driggers and the others of his approach, despite the additional fact that he knew he was behind his schedule and was not expected there at that time.

f. No signal was given by anyone on behalf of the petitioner to trains coming south, warning them of the

presence of engine No. 164 and the petitioner's employees at that point, although a signal or warning was given to north-bound trains approaching that locality.

g. No measures were adopted by the petitioner to safeguard Driggers and his co-employees by providing for a method of warning to Driggers and the other employees of the approach of a train at the point where they were working, cautioning them to remain on the engine until after the train had passed, with the result that the natural gestures of Conductor McDonald, unprovided with a proper signal, trying to warn Driggers to stay on the train, proved to be the signal to direct employees to get off the train to perform certain duties, and was understood by Driggers to direct him to leave the engine, which he did, instead of remaining thereon, which he would have done, if a proper signal for that purpose had been provided by the company.

h. Petitioner failed to provide proper methods of work and failed to provide competent supervision and measures to safeguard employees at a point where it required plaintiff's intestate to do his work, because it is clear from the testimony that plaintiff's intestate was killed while he was obeying the orders given him by his superior officer, including the signal which Conductor McDonald gave him and which meant to him under the system used by the petitioner, that his train was to be backed to the Seaboard Air Line track and that he was, accordingly, to jump down from his en-

gine and attend to the necessary switching for the operation; his position on the footboard in front of the engine, with his attention riveted upon the signaling conductor on the tracks ahead, precluding him from knowing anything of the approach of the fast train from behind, especially when no care was taken to blow the whistle of that train when it drew near to the engine on the front of which plaintiff's intestate was riding. It is obvious that if petitioner's employees had been provided with a proper method of signaling to warn employees to stay on a train when it was dangerous to alight, Conductor McDonald would have so signaled to Driggers, and Driggers would have stayed on the engine, and nothing would have happened to him, instead of which when McDonald, his conductor and foreman, knowing that Driggers was unaware of the approach of train No. 79 and from his position could not see it coming, instinctively used gestures in an effort to advise Driggers of the danger, he gave him the shove back signal, which virtually was an order to get off the engine.

As this Court has said in Milwaukee Railway Co. *vs.* Kellogg, 94 U. S., 469, "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances attending it."

The facts of this case reduced to a simple form are that Driggers was riding on the footboard in front of his engine as it was traveling southwestward around a

curve; that his view of the main line tracks to the north, as to the first part of this curve, was completely obstructed by billboards and shrubbery which prevented him from seeing train No. 79 on the main line tracks; and that he was unable, after his engine had passed the billboards and shrubbery, to see the train on the main line because his engine was by then running in a direction almost directly opposite that from which train No. 79 was coming, and because he was performing his duty to keep his eyes forward upon his conductor and foreman who had alighted ahead of him and was signaling to Driggers in a manner which, under the regulations of petitioner, indicated to Driggers that the engine on which he was riding was to be shoved back and he was, therefore, expected to get off and throw the switch; so that while Driggers was not in a position to see train No. 79 at any time, a fact which was obvious to Conductor McDonald standing on the ground directing Driggers' operation, and which caused him to signal to Driggers, the engineer on train No. 79 had a straight track ahead of him and saw, or could have seen, the Driggers engine for a distance of at least two thousand feet, and there was no reason why he should not have kept a lookout for Driggers and his crew, and why he blew no whistle warning to Driggers and the others of his approach, and why he did not reduce his speed to enable him to keep his train under proper control and stop it, if necessary, before he struck Driggers or anybody else working at that point; that the engineer of the train which killed Driggers knew that switching crews fre-

quently alighted at the spot where he saw or should have seen the Driggers engine working, and if he had kept a proper lookout he would have seen Conductor McDonald on the ground giving a "shove back" signal to somebody on the Driggers engine, which would have indicated to him the probability that a trainman would alight from the work train at that point; and, in spite of these facts, the engineer continued traveling, within the yard limits, at a speed of fifty miles an hour and over, and did not blow his whistle at any point nearer than two fifths of a mile from the place where he saw the Driggers engine, which he knew was of no avail to a man riding on an engine with the exhaust sounding in his ears, but who could, however, hear a whistle blown nearer to him.

The petitioner's instructions offered in evidence show that at the Southern Connection, the tower of which was a short distance north of the place where Driggers was struck, the maximum speed limit was forty (40) miles, and yet the engineer operated his train at a speed not only in excess of that, but in excess of the maximum speed of fifty (50) miles permitted at any point on the road. We say in excess of fifty (50) miles, because there can hardly be any question from the evidence that the engineer ran his train in excess of that speed, since Conductor McDonald, an experienced railroad man in the employ of the petitioner, not only at the time when Driggers was killed, but also at the time of the trial, who tried to give the petitioner the benefit of any doubt that he might have

on the subject, because of his being still in its employ, said the speed was *at least* fifty (50) miles per hour.

We respectfully submit that petitioner's failure to furnish Driggers with a safe place to work on a track where his vision was obstructed by billboards and shrubbery, the failure of the engineer to slacken his speed, blow his whistle, keep a proper lookout, or take any precaution to keep his train under control at a place where he knew switching was going on constantly, and his failure to take such precaution in the face of the signal he could have seen Conductor McDonald giving to Driggers, together with the engineer's plain violation of the speed limit within the yards, and of the maximum speed limit permitted by the rules of the railroad, the failure of the petitioner to give any signal to trains going south, warning them of the presence of Driggers' engine at that point, and the failure of the petitioner to provide suitable methods of work and competent supervision, as evidenced by the fatal result of the signal given by its conductor, McDonald, to Driggers, were all of them acts of negligence on the part of the petitioner, and certainly were questions to be submitted to a jury to determine whether or not they constituted negligence. The questions whether or not these acts if they constituted negligence, individually or jointly and concurrently, were the proximate cause of the death of plaintiff's intestate having also presented questions of fact for the jury to determine, and the court having properly submitted these questions for the jury's determination, and the jury having resolved them in favor of plain-

tiff, we respectfully submit that this Court will not disturb that decision.

Seaboard Air Line Rwy. *v.* Padgett, 236 U. S., 668;

Seaboard Air Line Rwy. *v.* Koennecke, 239 U. S., 352;

Seaboard Air Line Rwy. *v.* Lorick, 243 U. S., 572;

Illinois Central Rwy. *v.* Skaggs, 240 U. S., 66;

Milwaukee Rwy. Co. *v.* Kellogg, 94 U. S., 69;

Great Northern Rwy. *v.* Knapp, 240 U. S., 464.

In the light of the testimony on the foregoing points, it cannot be said that there was not ample evidence from which a jury of fair-minded men, under proper instructions, could not reasonably find that the petitioner was negligent and that such negligence was, either in whole or in part, the cause of the injury to plaintiff's intestate. We quote from the language of this Court in the Skaggs case, *supra*, as follows:

> "It is contended that the State Court erred in permitting a recovery under the Federal Statute, for the reason that the injury resulted from Skaggs' own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, or by reason of any

defect or insufficiency, due to its negligence, in its property or equipment, 36 Stat. at L., 65, Chap. 149, Comp. Stat. 1913, Sec. 8657. But, on the other hand, *it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury.* The inquiry must be whether there is neglect on the part of the employing carrier, and, if the *injury* to one employee *resulted 'in whole or in part'* from the negligence of *any of its other employees*, it is liable under the express terms of the act. That is, *the statute abolished the fellow-servant rule.* If the injury was due to the neglect of a co-employee, in the performance of his duty, that neglect must be attributed to the employer; and if the injured employee was himself guilty of negligence contributing to the injury, the statute expressly provides that it 'shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to such employee.'"

POINT 2.

No Assumption of Risk.

The trial court properly submitted to the jury the question of the assumption of risk by plaintiff's intestate, and the jury properly found from the evidence that plaintiff's intestate did not assume the risk.

It cannot be successfully urged that plaintiff's intestate assumed risks created by the negligence of the petitioner that were not obvious and apparent to him at the time, and a brief summary of the circumstances leads irresistibly to the conclusion that this was not a case in which the doctrine of assumption of risk could be applied.

We again wish to emphasize that Driggers, who was standing on the footboard in front of his engine, facing first toward the southwest, and then toward the south, during the time of the operation immediately preceding his stepping from the train, had his view of the main line tracks to the north obstructed completely during the first part of his engine's journey along the curve leading into the main line by the presence of billboards and shrubbery, which the defendant company negligently permitted to remain at the place in question, and was, from his position and the direction of his engine after it had passed into the latter phase of the curve and was headed almost due south, approaching the nearly parallel main line, prevented from seeing a train approaching from the north. Conductor McDonald testified positively that Driggers was facing south and could not see the train coming. The evidence shows that when Driggers reached a point where the billboards and shrubbery no longer obstructed his view, not only did his position and the direction of his engine prevent him from seeing a train coming from the north, but he was then and thenceforward, in the performance of his duty, looking straight ahead toward the south, the direction opposite that from which the train was coming, with his attention upon his superior officer, the conductor and yard foreman, to whom he was looking for signals, orders, and directions; and while he was so observing his conductor, as it was his duty to do, he received a signal from the conductor which, under the regulations of the petitioner and custom of railroad men, as testified to, led him to believe that he was being informed by

the conductor that his engine was to be shoved back, and that he was required then and there to leave his engine for the purpose of throwing a switch, all in the performance of his duty and in accordance with the signal and directions so received by him from his conductor. This was also at a time when, according to its schedule, train No. 79 should have already passed that point. Certainly, it cannot be successfully urged, we submit, that from the evidence the trial judge could have held, as a matter of law, that Driggers assumed the risk of being run over by a train which he could not see because of the negligent failure of the petitioner to furnish him with a safe place to work by obstructing his vision, and which he could not see because of the direction in which his own engine was traveling; such train, moreover, being negligently operated by the engineer, approaching at a terrific rate of speed, without warning to him of its approach, behind its regular schedule, at a time when his duty compelled him to look to his conductor in the direction opposite that from which the train was coming; and we respectfully submit that the court properly submitted this question to the jury, who resolved it in favor of the plaintiff.

Gila Valley, etc., R. Co. *v.* Hall, 232 U. S., 94;
Chicago, R. I. & P. R. Co. *v.* Ward, 252 U. S., 18;
Kell *v.* Rock Hill Fert. Co., 123 S. C., 199;
Yazoo & Miss. Valley R. R. Co. *v.* Wright, 235 U. S., 376;
Chesapeake & Ohio R. R. Co. *v.* Proffitt, 241 U. S., 462.

As to failure to apprehend danger when train is not running on schedule time, see:

Wrightville & T. R. Co. *v.* Gornto, 129 Ga., 204; 58 S. E., 770;

Seaboard Air Line Rwy. Co. *v.* Hollis, 20 Ga. App., 555; 93 S. E., 264.

Point 3.

The Charge on Speed.

We respectfully submit that the language used by the trial judge in connection with instructions to the jury on Specification (*b*) and Specification (*c*) of negligence charged in the complaint was neither prejudicial nor misleading to the jury, and, furthermore, that petitioner is clearly in error in the statement made in its brief to the effect that there was no evidence as to the train exceeding the fifty mile limit allowed by the rules or as to any rules limiting the speed of the train. Petitioner's instructions offered in evidence show that at the Southern Connection just above where Driggers was struck the maximum speed limit was forty (40) miles an hour, and that the maximum speed allowed on the main line for first class trains outside of yard limits was fifty (50) miles an hour, and that this train was then traveling within the yard limits; the petitioner's instructions also provided, in heavy black-face type, for "speed on all trains to be reduced when not consistent with safety." Conductor McDonald, still employed by the railroad at the time of trial, testified that the train was traveling at least fifty miles an hour at the point above referred to, which was in the

yard limits, and where switching was constantly going on, making it inconsistent with safety for any such speed to be maintained.

It is obvious, from the testimony in this case, that there was evidence to support both of the specifications complained of in this section of petitioner's brief.

As to the language used by the trial judge, conveying to the jury the information that the specifications might charge a noncompliance with the law in a general sense, we submit that a perusal of the charge as a whole will show that it was, in the language of the State Supreme Court, "eminently fair and not prejudicial." The court jealously guarded the rights of the defendants in its charge and repeatedly told the jury that it was for the jury to decide whether or not the defendants complied with the law as charged by it, and if they had not complied therewith, to decide whether or not such failure constituted negligence, and that even then the plaintiff could not recover unless such negligence was the proximate cause of the injury.

POINT 4.

Charge on Assumption of Risk.

Upon this question we submit that the trial court properly charged the jury. After telling the jury that it is the duty of the master to furnish a reasonably safe place for the servant, the court charged as follows:

> "And there is a corresponding duty on the servant. The servant has a right to assume that the master has furnished him a reasonably safe

place to work, and he does not have to make any minute inspection, or any investigation. He may assume that the master has performed his duty. *But if the place is dangerous—obviously dangerous, and can be seen by the servant, and he goes on and performs his duty after knowing that, why he assumes that risk. He takes the risk on himself, and if he is injured on account of that, he could not hold the master for that. Suppose you were employed by a railroad to work at a certain place. You would have a right to assume that the place was reasonably safe. But if the place was not reasonably safe, was dangerous, the danger was obvious to you, you could see it and knew it, and you undertook to work in that place and you got hurt, it would be your fault. Whether that happened in this case I don't know.*"

The trial court plainly told the jury, here and elsewhere, that even as to extraordinary risks, a servant could not hold the master liable if the place was obviously dangerous and he undertook to work there, and that it would be a risk which he assumed and could not recover as a result of any injuries sustained by him by reason of the assumption of such risk.

In the light of the full instructions given on this point, there was no likelihood of the jury's being misled. It is respectfully submitted that the rule that the entire charge will be taken into consideration in determining whether or not the law is properly covered is, we believe, elementary and requires little citation as a reminder that this Court has repeatedly declared

that the charge must be considered in its entirety in determining whether or not the law had been covered in the instructions to the jury. As to the refusal of the court to charge the request of petitioner in the language submitted, the law contained therein had already been covered in the main charge and there was no necessity for the court to repeat it to the jury.

Village of Evanston *v.* Gunn, 99 U. S., 660;
Baltimore & Potomac R. R. *v.* Mackey, 157 U. S., 72;
Spaulding *v.* Castro, 153 U. S., 38;
Booth *v.* White Engineering Co., 101 S. C., 483;
Hartwell *v.* Columbia Mills, 112 S. C., 177.

Respectfully submitted,

J. D. E. MEYER,
Attorney for Petitioner.

LOUIS M. SHIMEL,
SIDNEY RITTENBERG,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 225.—October Term, 1928.

Atlantic Coast Line Railroad Company, Petitioner, vs. Marcella Driggers, as Administratrix of William A. Driggers, deceased.	On Writ of Certiorari to the Supreme Court of South Carolina.

[June 3, 1929.]

Mr. Justice Sanford delivered the opinion of the Court.

William A. Driggers, an employee of the Railroad Company, suffered personal injuries that resulted in his death. The administratrix of his estate brought this action against the Railroad Company in a common pleas court of South Carolina. At the conclusion of the evidence the Railroad Company moved for a directed verdict. This was denied. The jury found for the administratrix; and the judgment entered on the verdict was affirmed by the Supreme Court of the State. — S. C. —.

It is unquestioned that the case is controlled by the Federal Employers Liability Act, under which it was prosecuted. Therefore, if it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the Railroad Company was the cause of the death, the judgment must be reversed. *Atlantic Coast Line* v. *Davis*, 279 U. S. 34, 35; and cases cited.

Driggers had been employed by the Railroad Company for about five years, and for about six months had been a member of a switching crew. He was injured by stepping off the footboard of the switch engine while it was in motion and striking the engine of a local passenger train that was passing along an adjacent track.

The scene of the accident was about three miles north of Charleston, within the yard limits, at a point where the Railroad Company has parallel double tracks, running north and south; the eastern

being the northbound main line; and the western, the southbound main line. These lines are 12 feet apart measured from center to center, with a clearance of 7 feet 8½ inches from rail to rail. The tracks are practically straight, and for a distance of about 2,000 feet to the north there is no obstruction to the view along the tracks. Leading from the northbound main line there is a spur track—called the Etiwan Lead—running in a northeasterly course, on a northerly curve, to a coal yard. The switch for this spur track is controlled by a lever on the east side of the main line. In leaving the main line and proceeding along the spur track for about three car lengths, that is about 120 feet, the view to the north along the main line tracks was unobstructed; but beyond this distance there was shrubbery and a billboard on the north side of the track which obstructed the view to the north. This spur track was used by the switching crew every day, sometimes more than once. On the day of the accident—which was clear and bright—the switch engine left Charleston and went up the northbound main line for the purpose of transferring some cars on the Etiwan Lead to a connection point with the Southern Railway that was some distance to the north. To do this it was necessary to go on the spur track, cut out a car, return to the northbound main line with the cars to be transferred, and shove them up that line to the connection point where the cars were to be delivered.

On approaching the Etiwan Lead the conductor of the switching crew, after telling Driggers—who was the brakeman—to cut out a car, got down and opened the switch for the spur track. He then left the switch open,[1] and walked across the north and south lines and adjoining double tracks of the Southern Railway, to a point about 15 or 20 feet west of the Southern Railway tracks, to look for a train.

Meanwhile the switch engine went on the spur track, and after doing the necessary switching work, returned with the attached cars to the main line, moving at about six miles an hour, upgrade. The engine was in front—facing the switch. Driggers was standing on the righthand footboard in front of the engine. In going over the last portion of the spur track, where the vision to the north was unobstructed, he was facing nearly south, and could not see

[1]This automatically threw a red signal on the line at a point to the south.

to the northward without looking back. He was expecting that after the switching train had gone on the northbound line the cars would be shoved back up that line to the connection point. But as the switch had been left open it would not have to be turned until the cars had passed down the main line beyond it, when it would have to be closed so that the train might pass back up the line.

Just as the switch engine reached the northbound main line, proceeding southwardly down that line, the conductor, who had heard the whistle of a passenger train on the southbound main line and saw the approaching train, tried to call the attention of Driggers —who was looking at him at the time—to the train, pointed to it and told him to stay on the footboard. The exhaust on the switch engine prevented him from hearing what the conductor said. The signal which the conductor gave to show him that the passenger train was coming was the same signal which would tell him that the switching train was to back up the northbound main line. The only answer that Driggers gave was a nod of the head, indicating that he understood that the switching train was to be shoved back up that line. Thereupon, despite the noise from the exhaust of the switch engine, without looking back to see whether any train was approaching, and without having received any signal to dismount from the switch engine for any purpose whatever, and while the switch engine was in motion entering upon the southbound line, Driggers stepped off the right end of the footboard in the space between the northbound and southbound lines and swung or was thrown into the pilot sill of the engine of the passenger train on the southbound line, which was passing at that moment, and was instantly crushed and killed.

The undisputed evidence shows that Driggers had no duty which required him to dismount from the switch engine at that time, but was supposed to remain on the engine, although it was optional for him to get off and throw the switch.

On the other hand, the undisputed evidence shows that the passenger train, which was a few minutes behind time, and was running from 35 to at least 50 miles an hour, had a clear and unobstructed right of way on the southbound line. The engineer was on the lookout ahead, had blown signals at a point about 2,000 feet to the north, and again before reaching the scene of the ac-

cident; and the automatic bell on the engine, which he had set in motion, was ringing continuously up to the time of the accident. There was no obstruction whatever on the line ahead. Although the engineer saw the switch engine about to enter in a southerly direction on the northbound main line, there was nothing to indicate that any member of its crew would attempt to dismount between the two lines; and Driggers suddenly struck the side of the engine behind the pilot, in a position where he was not and could not have been seen by the engineer, and when it was impossible to stop the train.

Under these circumstances, it is clear that Driggers, by his own negligence, as the sole and direct cause of the accident, brought on his own death, and that there is no ground upon which the liability of the Railroad Company may be predicated. Compare *Atlantic Coast Line* v. *Davis*, *supra*, p. 39; and cases cited.

The rate of speed at which the passenger train was running was, plainly, not a proximate cause of the injury, as the engine of that train did not run into Driggers, but he, as the result of his own action, was thrown against the side of the engine as it was passing. *See Patterson* v. *Director General*, 115 S. C. 390, 396.

The contention that his death was caused by the negligence of the Railroad Company in any respect in which it owed a duty to him is without any substantial support; and the jury should have been instructed to find for the Railroad Company.

The judgment is reversed, and the cause remanded to the Supreme Court of South Carolina for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.